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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.**

COMPILED AND ANNOTATED

By A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISES ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

Vol. XC.

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VOL. XC.

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AMERICAN DECISIONS.
VOL. XC.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

BALTIMORE AND OHIO RAILROAD Co. v. BREINIG.

[25 MARYLAND, 373.]

NEGLECT OF RAILROAD COMPANY IS GENERALLY MIXED QUESTION OF LAW AND FACT.

QUESTION OF NEGLIGENCE IS ONE FOR JURY TO DECIDE; but as negligence consists in the failure or omission to perform some duty which the law imposes, it is within the province of the court to declare what that duty requires, or to lay down the rules of law applicable to the particular case, so that the jury may have some certain guide in forming their verdict.

STANDARD OR DEGREE OF DILIGENCE IMPOSED BY LAW IN PARTICULAR CASES cannot be fixed by any general definition, on account of the varied and complicated character of cases, and the ambiguity and imperfection of our language. And any attempt to do so generally produces difficulty and confusion, instead of tending to establish plain and intelligible rules which will aid the jury in their investigations, and restrain them within just and proper limits.

AMOUNT OR DEGREE OF CARE IMPOSED BY LAW UPON RAILROAD COMPANIES in the prosecution of their business must vary according to circumstances, and should be commensurate with the risk or danger of inflicting injury upon others.

OBIGATION OF RAILROAD COMPANY FOR SAFE TRANSPORTATION OF PASSENGER IS ONE ARISING FROM CONTRACT, imposing duties growing out of the relation between the parties, involving trust and confidence, and requiring the exercise of the utmost diligence and care.

NO RELATION OF CONTRACT, TRUST, OR CONFIDENCE EXISTS BETWEEN RAILROAD COMPANY AND STRANGER; each party being in the lawful pursuit of his own business, or the lawful exercise of his own rights, is required only to exercise such reasonable care to avoid injuring the other as ordinary prudence suggests.

RAILROAD COMPANY, THOUGH NEGLIGENT, IS NOT LIABLE TO ONE INJURED BY IT IF HE WAS ALSO NEGLIGENT. Where one, not a passenger, but
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a stranger to a railroad company, was injured while crossing its track through the thoroughfares of a city, but might have escaped such injury by the exercise of diligence such as was to be reasonably expected from the age and intelligence of such person, the company will not be liable in damages for such injury, although it may be chargeable with negligence.

ACTION by the appellee against the appellant, instituted on December 30, 1863, to recover damages for injuries received while attempting to cross the road of the appellant laid in the streets of the city of Baltimore. The plaintiff declared that the defendant, a corporation, owning a railroad and accustomed to run railway cars along the track of said road, did negligently and carelessly cause said cars to run upon and against the plaintiff, whereby she was greatly injured, permanently maimed and crippled, and her life imperiled. Defendant pleaded that it did not commit the wrong charged, and was not guilty in the premises; upon which issue was joined. It appeared upon the trial that on June 9, 1859, the plaintiff, who was six years old, was living with her father and attending school, and had been attending school for eighteen months; that her route to and from school required her to cross the track of the Baltimore and Ohio railroad at one of the streets just below Camden station; that on the evening of said day the plaintiff, with two or three of her companions, while returning from school, approached the railroad where it crossed Henrietta Street, one or two squares out from Camden station, where there were three parallel tracks, or two tracks and a siding; that the children approached the tracks as two trains were moving upon parallel tracks, in opposite directions, and propelled by steam; that one train was going out, led by a heavy engine at a considerable rate of speed, and the other, consisting of nine cars, backing in slowly, and pushed by a heavy engine; that the children avoided the outward-bound train, but were run against by the backing train and knocked down; that the child, whose hand was clasped in that of the plaintiff, was killed; and that the plaintiff was knocked down and run over, sustaining injuries of a private nature, and receiving serious and permanent injuries in her foot, the calf of her leg, and hip. It further appeared that the train which did the injury was backing at the time, and had no guard or lookout at the rear; that it was under the care and management of two men only, a brakeman, who was acting as conductor, and an engineer, who was acting also as fireman; that at the

time of the injury the engineer was on the engine, and the brakeman on the ground, either beside the engine or between the cars for the purpose of uncoupling them; and that neither of them saw the accident, or knew of it until their attention was called to it by others, when they found the children crushed and under the second car from the rear. Upon this evidence the defendant offered three prayers. The first one was rejected by the court, but the second and third were granted. The second prayer was as follows: "If the jury shall believe that the plaintiff would have escaped the injury complained of by the exercise of diligence on her part, such as was reasonably to be expected from her age and intelligence at the time, then she is not entitled to recover, even though the jury should find negligence on the part of the defendant or its agents." And the third: "That there is no evidence in the case, should the jury find for the plaintiff, of such wanton and malicious or gross and outrageous conduct on the part of the defendant or its agents as would warrant punitive damages, and that actual damage is all the plaintiff can recover." The jury were instructed that defendant was required "to exercise the utmost care and diligence which it had the means and power to employ, having regard to the business in which it was engaged"; that if defendant, in using such care and diligence, would thereby have prevented the accident, that then plaintiff would be entitled to recover, unless the accident could have been avoided by the exercise of that degree of care by the plaintiff which was, under the circumstances of the case, to be naturally and reasonably expected in one of the plaintiff's age and intelligence. Defendant excepted to the first instruction, imposing the rigorous rule of care and diligence, and to the rejection of its first prayer. Verdict and judgment for plaintiff, and defendant appealed.

John H. B. Latrobe and Ferdinand C. Latrobe, for the appellant.

Henry Stockbridge, for the appellee.

By Court, BARTOL, J. Few cases have caused greater embarrassment to the courts than those involving questions of negligence on the part of railroad companies and their agents in the management and conduct of their engines and trains. This grows in a great measure out of the nature of the question itself. Being generally a mixed question of law and

fact, it is not very easy at all times to define the limit that separates the jurisdiction of the court from that of the jury.

While in the jurisprudence both of England and this country the general rule is established that the question of negligence is one for the jury to decide, yet, as negligence consists in the failure or omission to perform some duty which the law imposes, it is within the province of the court to declare what that duty requires, or to lay down the rules of law applicable to the particular case, so that the jury may have some certain guide in forming their verdict. In the discharge of this duty, the courts have often attempted, by some general definition, to fix the standard or degree of diligence imposed by the law in particular cases; this, from the nature of the subject, and from the varied and complicated character of cases, as well as from the ambiguity and imperfection of our language, it is not possible to accomplish; and the attempt to prescribe such a standard has often produced difficulty and confusion instead of tending to establish plain and intelligible rules so as to aid the jury in their investigations, and restrain them within just and proper limits.

It is a very obvious principle of law, as well as of justice and common sense, that every one, in the prosecution of his business, is bound to exercise that degree of skill, prudence, and care to avoid inflicting injury upon others proportioned to the danger. When applied to railroad companies, employing machinery propelled by the dangerous and powerful agency of steam, moving bodies of immense weight and bulk, often with great velocity, necessarily exposing to danger the lives and limbs, not only of passengers in the train, but of others whose occupations require them to go upon or to cross the railway, this principle imposes on the company the legal obligation to observe a higher degree of skill and care than would be exacted in the management of the ancient, more simple, and less dangerous modes of conveyance. And this again must be varied by other circumstances, such as the place where the train is moved, and the degree of risk and danger of injury to others.

This court has had before it recently several cases in which it was necessary to express our judgment upon the degree or measure of diligence required by the law in such cases.

In the case of *Baltimore and Ohio R. R. Co. v. Worthington*, 21 Md. 275 [83 Am. Dec. 578], where a passenger sued to recover damages resulting from an accident to the train in

which he was riding, it was held that in order to exempt the defendant from liability, it was bound "to exercise the utmost care and diligence which human prudence and foresight could employ." Or in other words, the legal duty growing out of the undertaking of the defendant as a carrier of passengers imposed on it the highest degree of diligence and care; and for a failure or omission to perform this duty in any particular the defendant was responsible.

At the last term the cases of *State, Use of Coughlan, v. Baltimore and Ohio R. R. Co.*, 24 Md. 84 [87 Am. Dec. 600], and *Bannon v. Baltimore and Ohio R. R. Co.*, 24 Id. 108, came before us for decision; those were cases like this, where injury had been inflicted by a railroad train, not upon passengers in the cars, but persons in no way connected with the railroad company, while passing over or upon the railway, and a distinction was drawn between cases of that kind and the case of a passenger upon the train, growing out of the difference in the obligation and duty of the railroad company in the two cases.

The reasoning of Judge Willard, who delivered the opinion of the supreme court of New York in *Brand v. Troy and Schenectady R. R. Co.*, 8 Barb. 376, was quoted with approbation, as showing the true grounds upon which this distinction rests, and as correctly defining the nature and extent of the duty imposed by law upon the defendant in a case like the present. In the argument of this cause, we have been asked to review and modify the decisions pronounced at the last term. But upon more mature reflection, aided by the argument of this case, and the authorities cited, we are of opinion that the distinction taken in *Brand v. Troy and Schenectady R. R. Co.*, *supra*, and heretofore sanctioned by this court, is just and reasonable, and based upon sound principles, notwithstanding it seems to have been questioned in one of the later cases in New York: See *Johnson v. Hudson R. R. Co.*, 6 Duer, 641, 642.

The obligation of a railroad company for the safe transportation of a passenger is one arising from contract, imposing duties growing out of the relation between the parties, involving trust and confidence, and requiring the exercise of the utmost diligence and care, while towards a stranger no such relation exists; each party being in the lawful pursuit of his own business, or the lawful exercise of his own rights, is not bound by the same rigorous rule, but is required to exercise such reasonable care to avoid injuring the other as ordinary prudence would suggest; of course, the amount or degree of

care which this rule requires must vary according to circumstances, and should be commensurate with the risk or danger of inflicting injury upon others.

Or, as very happily defined by Judge Sutherland (*Wells v. N. Y. Cent. R. R. Co.*, 24 N. Y. 187), "that care and attention which experience has found reasonable and necessary to prevent injury to others in like cases."

In this case, the instruction given to the jury by the court below is almost identical with that in the cases of Coughlan and Bannon, to which we have referred, requiring the defendant "to exercise the utmost care and diligence which they had the means and power to employ, having regard to the business in which they were engaged." This rule, as we have heretofore decided, is too rigorous, and imposed upon the railroad company more than is required in such cases, and for that reason the judgment must be reversed and the case sent back for a new trial.

We think there was no error in the other rulings of the superior court. The propositions contained in the second and third prayers of the defendant have already received the sanction of this court in the case of *State v. Baltimore and Ohio R. R. Co.*, 24 Md. 84 [87 Am. Dec. 600], before referred to, and properly announced the law in this case, both as to the question of diligence on the part of the plaintiff and the true measure of damages. The first prayer of the defendant was, in our opinion, properly rejected, because it altogether ignores or omits to notice some material facts which were proper for the consideration of the jury in passing upon the question of negligence, such as the observance by the defendant's agents of the precautionary measures prescribed by the city ordinances; and also the having such a complement of men in the management of the train as reasonable care and prudence might, in the opinion of the jury, have required under the circumstances.

Judgment reversed, and *procedendo* ordered.

NEGLIGENCE IS MIXED QUESTION OF LAW AND FACT, which should go to the jury under proper instructions from the court: *Trow v. Vermont Cent. R. R. Co.*, 58 Am. Dec. 191; *Mad River etc. R. R. Co. v. Barber*, 67 Id. 312; *Norris v. Litchfield*, 69 Id. 546; note to *Snow v. Housatonic R. R. Co.*, 85 Id. 731; *Philadelphia etc. R. R. Co. v. Spearen*, 86 Id. 544; *Smith v. O'Connor*, 86 Id. 582.

NO ABSOLUTE RULE AS TO WHAT CONSTITUTES NEGLIGENCE CAN BE LAID DOWN: *Philadelphia etc. R. R. Co. v. Spearen*, 86 Am. Dec. 544. What is reasonable or due care depends on subject-matter to which care is to be applied, and the attendant circumstances: *Davis v. Winslow*, 81 Id. 573; note to *Smith v. O'Connor*, 86 Id. 587.

LIABILITY OF RAILROAD TO ONE NEITHER PASSENGER NOR EMPLOYEE FOR INJURY: *Thayer v. St. Louis etc. R. R. Co.*, 85 Am. Dec. 409, note 412; *Philadelphia etc. R. R. Co. v. Spearen*, 86 Id. 544, note 552; note to *Nelson v. Western R. R. Corp.*, 69 Id. 628. Railroad companies may be liable for wanton injuries to persons with whom they have no contract relation, even though there be negligence on the part of the injured party: *Thayer v. St. Louis etc. R. R. Co.*, 85 Id. 409.

DOCTRINES OF NEGLIGENCE AS APPLIED TO CHILD OF TENDER YEARS: *Smith v. O'Connor*, 86 Am. Dec. 582, note 587; *Philadelphia etc. R. R. Co. v. Spearen*, 86 Id. 544, note 552; *Rauch v. Lloyd*, 72 Id. 747, note 757.

PLAINTIFF CANNOT RECOVER FOR NEGLIGENCE WHERE HE WAS HIMSELF NEGLIGENT: See note to *Warren v. Fitchburg R. R. Co.*, 85 Am. Dec. 706; *Illinois Cent. R. R. Co. v. Buckner*, 81 Id. 282.

THE PRINCIPAL CASE WAS APPROVED AND FOLLOWED IN *Philadelphia etc. R. R. Co. v. Kerr*, 25 Md. 529, 530; *Baltimore etc. R. R. Co. v. State*, 29 Id. 259. In the former case, each party was in the pursuit of a lawful business, and their relations were in all respects precisely like those disclosed in the principal case; and in the latter, the instruction of the court was entirely similar to that given in the principal case. The doctrine in Maryland, whatever it may be elsewhere, is plainly this: "That whilst a railroad company in the lawful pursuit of its business, employing useful but dangerous powers, is required to observe a degree of caution and care proportioned to the increased risk and danger of inflicting irreparable injury upon others in like lawful pursuit of their avocations, the duty is not imposed upon it of using every possible contrivance that human ingenuity might provide; but regarding the dangerous nature of its employment, and its liability seriously to interfere with the pursuits of others, it should be vigilant in making use of every reasonable safeguard which the nature of its business will admit, to avoid unjust interference with others": *Baltimore etc. R. R. Co. v. State*, 29 Id. 259. The principal case was noticed in *Philadelphia etc. R. R. Co. v. Horfick*, 62 Id. 313, where it was said that in the head-note of the principal case it is stated that where there is no evidence of wanton and malicious or gross and outrageous conduct on the part of the defendant, actual damage is the limit of the plaintiff's recovery. This question, however, was said not to have been before the court of appeals, and was not decided by it; and as an abstract proposition, that the principle thus announced is erroneous; for damages are liable to be increased by every circumstance of aggravation which raises the wrong above the level of an unintentional injury, although it falls far short of wanton malice or gross outrage.

DUTY AND LIABILITY OF RAILROAD COMPANY TO PERSONS WITH WHOM IT HAS NO CONTRACT RELATION, AND WHO ARE LAWFULLY UPON ITS TRACK, CARS, OR PREMISES. — 1. USE AND CONTROL OF PREMISES BELONGING TO RAILROAD COMPANY. — As trespassers cannot "lawfully" be on railroad premises, this note will not deal with them, though they have no contract relation with the company. At places other than crossings, or in public highways, a railroad track is the private property of the company, and no one other than the company's servants or employees, in the necessary discharge of duties there, have any right to be thereon; and more especially so as to their using the same as a thoroughfare or pathway on which to walk or travel: *Philadelphia etc. R. R. Co. v. Hummel*, 44 Pa. St. 375; S. C., 84 Am. Dec. 457; *Isabel v. Hannibal etc. R. R. Co.*, 60 Mo. 475; S. C., 9 Am. R'y Rep. 951; *Kansas Pacific R'y Co. v. Ward*, 4 Col. 30; *Finlayson v. Chicago etc. R. R.*

Co., 1 Dill. 579; *Pittsburgh etc. R'y Co. v. Collins*, 87 Pa. St. 405; *Patterson v. Philadelphia etc. R. R. Co.*, 4 Houst. 103; S. C., 7 Am. R'y Rep. 207; *Sweeney v. Boston etc. R. R. Co.*, 128 Mass. 5; S. C., 1 Am. & Eng. Rail. Cas. 138, and see annotations, p. 140; *Illinois etc. R. R. Co. v. Heherington*, 83 Ill. 510; *McCarty v. Delaware etc. Canal Co.*, 17 Hun. 74; and the platform of a railroad company at a station or depot is not a public highway. There is no dedication to public use as such. It is for the use of the company itself, and those resorting there who have business with the company. The company owes to such persons the duty of seeing that such platform is of suitable strength and construction for comfort and safety. But they owe no such duty to the general public who may resort there without any business, or from idle curiosity, and are not liable for injuries to such persons arising from mere negligence. No damages in such cases can be recovered except for wanton injury: *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129; *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; *Pittsburgh etc. R'y Co. v. Collins*, 87 Pa. St. 405.

2. RAILROAD COMPANY IS LIABLE FOR ANYTHING IN NATURE OF TRAP, which, although upon its own premises, is yet so near a highway adjoining or crossing its premises as to endanger the safety of travelers on such highway. Illustrations of this rule will be found in cases of unprotected pits and excavations dug within the railroad's premises, and yet so near a highway that those who pass are liable, without fault on their part, to fall into them. The same principle, in this respect, which applies to other owners and tenants of real estate, is obviously applicable to railroad companies: See extended note to *Zoebesch v. Tarbell*, 87 Am. Dec. 660, showing when an owner is answerable for injuries to persons coming on his premises; *Myers v. Snyder*, Bright. N. P. 489; *Grier v. Sampson*, 27 Pa. St. 183; *Bush v. Johnston*, 23 Id. 209; *Beatty v. Gilmore*, 16 Id. 463; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Jarvis v. Dean*, 3 Bing. 447; S. C., 11 Eng. Com. L. 447; *Wettor v. Dunk*, 4 Fost. & F. 298; *Proctor v. Harris*, 4 Car. & P. 337; S. C., 4 Eng. Com. L. 337; *Howland v. Vincent*, 10 Met. 371; *Coupland v. Hardingham*, 3 Camp. 398; *Barnes v. Ward*, 9 Com. B. 392; S. C., 67 Eng. Com. L. 392.

3. RAILROAD IS LIABLE FOR NEGLIGENT CONSTRUCTION OR MAINTENANCE OF ITS BUILDINGS, ETC., CAUSING INJURY TO PERSONS LAWFULLY ON HIGHWAY. Where the line or premises of a railroad abut upon a public highway, the railroad, like other owners or occupants of real estate, is liable to persons lawfully upon the highway for any injury caused by its negligence in the original construction of, or in its failure to maintain in repair, its line and premises: *Beatty v. Cent. I. R'y Co.*, 58 Iowa, 242; S. C., 8 Am. & Eng. Rail. Cas. 210; *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 368; S. C., 87 Am. Dec. 644; *Stewart v. Pennsylvania R'y Co.*, 14 Am. & Eng. Rail. Cas. 679; *Goldthorpe v. Hardman*, 13 Mees. & W. 377; *Drew v. New River Co.*, 6 Car. & P. 754; S. C., 25 Eng. Com. L. 634; *Smith v. West Derby Local Board*, L. R. 3 C. P. D. 423; *Robbins v. Jones*, 15 Com. B., N. S., 221; *Kearney v. London etc. R'y Co.*, L. R. 5 Q. B. 411; S. C., 6 Id. 759; *Tarry v. Ashton*, L. J. 1 Q. B. 314; *Clark v. Chambers*, 3 Id. 327; *Byrne v. Boadle*, 2 Hurl. & C. 722; *Pennsylvania etc. Canal Co. v. Graham*, 63 Pa. St. 290; *Cumberland Valley etc. R. R. Co. v. Hughes*, 11 Id. 141; *Oakland R'y Co. v. Fielding*, 48 Id. 320; *Schuylkill Nav. Co. v. McDonough*, 33 Id. 73; *Homan v. Stanley*, 66 Id. 464; *Norristown v. Moyer*, 67 Id. 355; *Rapho v. Moore*, 68 Id. 404; *Hays v. Gallagher*, 72 Id. 136. Thus, where a railroad line crossed a highway by a bridge, the company was held liable to the plaintiff, who, while walking on the highway under the bridge, was injured by the falling of a brick from an abutment; the falling of the brick being considered, in the absence of expla-

nation by the company as to the cause of its fall, to be evidence of negligence: *Kearney v. London etc. R'y Co.*, L. R. 5 Q. B. 411; S. C., 6 Id. 759; *Coote v. Boston etc. R. R. Corp.*, 133 Mass. 185. And so where a highway is carried over a railroad line by a bridge. Thus, where a canal and railway company had, under statutory authority, constructed its canal, and had cut a public highway, and placed there a swivel bridge, which when moved for the passage of boats left the highway unfenced, and at night also unlighted, and the plaintiff's decedent, while walking on the highway at night, having stepped into the canal, on account of the bridge being left open for the passage of a boat, and having been drowned, it was held that the company was liable: *Manley v. St. Helens Canal & R'y Co.*, 2 Hurl. & N. 840; *Pennsylvania etc. Canal Co. v. Graham*, 63 Pa. St. 290; *Dickie v. Boston etc. R. R. Co.*, 131 Mass. 516; S. C., 8 Am. & Eng. Rail. Cas. 203; *Titcomb v. Fitchburg R. R. Co.*, 12 Allen, 254. And where a canal company was required by its charter to build and keep bridges in repair, by which highways were carried over the canal, and the plaintiff passed over one of these bridges and was injured by the fall of the bridge, which resulted from negligence on the part of the company, it was held that the company was liable: *Pennsylvania etc. Canal Co. v. Graham*, 63 Pa. St. 290. So where a contractor for the construction of a railroad line had, in the course of his employment, diverted a public footpath, and had left the point of divergence from the old way unguarded and dangerous by reason of its leading onto the line of the railroad, he was held liable in damages to one who, at night, followed the old way, and was injured by falling over a bridge abutment. The ground of the decision was that "a duty is cast upon those who, in the exercise of statutory powers, divert a public footpath, to protect, by fencing or otherwise, reasonably careful persons using the footpath from injury, through going astray at the point of diversion": *Hurst v. Taylor*, L. J. 14 Q. B. D. 918. And where a railroad line is constructed upon a highway which it is the duty of the company to keep in repair, the company will be liable for injuries received through a failure of its duties in this respect: *Oakland R'y Co. v. Fielding*, 48 Pa. St. 320; *Rathburn v. Burlington etc. R. R. Co.*, 16 Neb. 441; S. C., 19 Am. & Eng. Rail. Cas. 137; *Street R. R. Co. v. Nolthenius*, 40 Ohio St. 376; S. C., 19 Am. & Eng. Rail. Cas. 191; *Galveston City R'y Co. v. Nolan*, 53 Tex. 139; S. C., 3 Am. & Eng. Rail. Cas. 387; thus a railroad company whose line occupied a public highway, and who had negligently permitted a hole in the highway to remain unrepaired, was held liable to the plaintiff, who was injured by falling into the hole: *Oakland R'y Co. v. Fielding*, 48 Pa. St. 320. So where the line is constructed on a highway within the bounds of a municipality whose ordinances, made under a legislative grant of authority, require the line to be kept clear of snow, the railway is liable for injuries done by its failure to remove the snow in a reasonable time: *Bowen v. Detroit City R'y Co.*, 54 Mich. 496; S. C., 19 Am. & Eng. Rail. Cas. 131. So where a railroad company has permitted an "engineer-stake" to remain on a highway in the street of a town, and the plaintiff has been injured by falling over that stake while lawfully walking on the highway, the company is liable to him in damages therefor: *Gudger v. Western etc. R. R. Co.*, 87 N. C. 325. So a railroad company is liable to one injured on a highway by the fall of a derrick used in the construction of a culvert under such highway and alongside of the company's railroad: *Conlon v. Eastern R. R. Co.*, 135 Mass. 195; S. C., 15 Am. & Eng. Rail. Cas. 99.

RAILROAD COMPANY IS LIABLE TO PERSONS LAWFULLY ON HIGHWAY FOR INJURIES CAUSED BY NEGLIGENT OPERATION OF ITS LINE, — as where a

passer on the highway is injured by the negligent roping of a car into a coal-yard: *North Pennsylvania R. R. Co. v. Robinson*, 44 Pa. St. 175; or by the obstruction of a highway by cars permitted to remain at rest, and blocking up a crossing: *Rauch v. Lloyd*, 31 Id. 358; *Pennsylvania R. R. Co. v. Kelly*, 31 Id. 372; *Corey v. Northern Pacific R. R. Co.*, 32 Minn. 457; S. C., 19 Am. & Eng. Rail. Cas. 352; *Jackson v. Nashville etc. R'y*, 13 Lea, 491; S. C., 19 Am. & Eng. Rail. Cas. 433; *State v. Morris etc. R. R. Co.*, 25 N. J. L. 437; *Young v. Detroit etc. R'y Co.*, 19 Am. & Eng. Rail. Cas. 417; or by a hand-car negligently left upon a highway bridge: *Pittsburgh etc. R. R. Co. v. Spanier*, 85 Ind. 165; S. C., 8 Am. & Eng. Rail. Cas. 453; or by the fright of horses caused by the unnecessary and excessive whistling of an engine: *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259; *Chicago etc. R. R. Co. v. Dunn*, 52 Ill. 451; *Chicago etc. R. R. Co. v. Dickson*, 88 Id. 431; *Culp v. Atchison etc. R. R. Co.*, 17 Kan. 475; *Georgia R. R. Co. v. Newsome*, 60 Ga. 492; *Georgia R. R. Co. v. Thomas*, 68 Id. 744; *Philadelphia etc. R. R. Co. v. Stinger*, 78 Pa. St. 219; *Kase v. Greenough*, 88 Id. 405; or by an unnecessary and excessive escape of steam from an engine: *Manchester etc. R'y Co. v. Fullarton*, 14 Com. B., N. S., 54; S. O., 108 Eng. Com. L. 54; *Louisville etc. R. R. Co. v. Schmidt*, 81 Ind. 264; S. C., 8 Am. & Eng. Rail. Cas. 248; *Gibson v. St. Louis R'y Co.*, 8 Mo. App. 488; *Stott v. Grand Trunk R'y Co.*, 24 U. C. O. P. 347; *Borst v. Lake Shore etc. R'y Co.*, 66 N. Y. 639; *Billman v. Indianapolis etc. R. R. Co.*, 76 Ind. 166; S. C., 6 Am. & Eng. Rail. Cas. 41; *Toledo etc. R'y Co. v. Harmon*, 47 Ill. 298; *Geveke v. Grand Rapids etc. R. R. Co.*, 22 Am. & Eng. Rail. Cas. 551; or by the frightening of a horse caused by a derrick negligently permitted to remain projecting over a highway in such a manner as would naturally frighten horses: *Jones v. Housatonic R. R. Co.*, 107 Mass. 261; or by the frightening of a horse caused by a hand-car left at a crossing: *Vare v. Grand Trunk R'y Co.*, 23 U. C. O. P. 143; *Myers v. Richmond etc. R. R. Co.*, 87 N. C. 345; S. C., 8 Am. & Eng. Rail. Cas. 293; *Bussian v. Milwaukee etc. R'y Co.*, 56 Wis. 325; S. C., 10 Am. & Eng. Rail. Cas. 716; or by the falling of burning coals from the fire-box of an engine of an elevated railroad upon the back of a horse attached to a wagon on the street under the line, and upon the hand of the driver of the wagon, which caused the horse to run away, prevented the driver from controlling him, and thereby causing an injury to the plaintiff: *Lowery v. Manhattan etc. R'y Co.*, 99 N. Y. 158. A railroad company is, however, not liable for injuries resulting from the frightening of horses on a highway caused by the mere sight of the train, or by the noises necessarily incident to its movement: *Hahn v. Southern Pacific R. R. Co.*, 51 Cal. 606; *Flint v. Norwich etc. R. R. Co.*, 110 Mass. 222; *Beatty v. Cent. Iowa R'y Co.*, 58 Iowa, 242; S. C., 8 Am. & Eng. Rail. Cas. 210; *Burton v. Philadelphia etc. R. R. Co.*, 4 Harr. (Del.) 252; *Whitney v. Maine Cent. R. R. Co.*, 69 Me. 208; nor where the fright is caused by the ordinary noise of a train in passing over a bridge: *Favor v. Boston etc. R. R. Corp.*, 114 Mass. 350; nor where the fright was caused by an ordinary escape of steam from a locomotive: *Whitney v. Maine Cent. R. R. Co.*, 69 Me. 208; nor is a railroad company liable for injuries caused by leaving a car at a highway crossing, and thereby frightening a horse, unless it is shown that the necessary effect of leaving the car in that position was to frighten horses who were not more than usually nervous: *Gilbert v. Flint etc. R'y Co.*, 51 Mich. 488; compare *Pittsburgh etc. R'y Co. v. Taylor*, 104 Pa. St. 306.

RAILROAD COMPANY IS LIABLE FOR INJURIES CAUSED BY HIGHWAY CROSSINGS NEGLIGENTLY CONSTRUCTED OR MAINTAINED, for it is generally the duty of the company, where its line is carried across a pre-existing highway, to

keep the crossing in repair: *Farley v. C. etc. R. R. Co.*, 42 Iowa, 234; *State v. Dayton etc. R. R. Co.*, 36 Ohio St. 436; S. C., 5 Am. & Eng. Rail. Cas. 312; *Paducah etc. R. R. Co.*, 80 Ky. 147; S. C., 10 Am. & Eng. Rail. Cas. 318; *People v. Chicago etc. R. R. Co.*, 67 Ill. 118; *Pittsburgh etc. R'y Co. v. Dunn*, 56 Pa. St. 280; *Ferguson v. Virginia etc. R. R. Co.*, 13 Nev. 184; but the company is not bound to improve the highway so as to put it in better order than it was before the railroad crossed it: *Beatty v. Central Iowa R'y Co.*, 58 Iowa, 242; S. C., 8 Am. & Eng. Rail. Cas. 210. This duty to repair includes the repairing of embankments which are a necessary part of the crossing: *Farley v. C. etc. R. R. Co.*, 42 Iowa, 234. The test is whether or not the crossing as constructed and maintained by the railroad unnecessarily impairs the usefulness of the highway, and interferes with the safe enjoyment of that highway by the public; if it does, the railroad company has not performed its duty in the premises; if it does not, the company has done all that it ought to be expected to do: *People v. New York etc. R. R. Co.*, 89 N. Y. 266; S. C., 10 Am. & Eng. Rail. Cas. 230. And the railroad company is not to be relieved from the performance of this duty because a street-railroad whose line uses the highway and the crossing as a part thereof is under a like obligation to keep the crossing in repair: *Masterson v. New York etc. R. R. Co.*, 84 N. Y. 247; S. C., 3 Am. & Eng. Rail. Cas. 408. While as a general rule a railroad company is not bound to keep in repair the crossings of highways which have not been legally laid out and opened, *Flint etc. R'y Co. v. Willey*, 47 Mich. 88, S. C., 5 Am. & Eng. Rail. Cas. 305, *Missouri etc. R'y Co. v. Long*, 27 Kan. 684, yet when it has licensed a general and public use of such a crossing, it is bound to maintain such crossing in repair: *Kelly v. Southern etc. R. R. Co.*, 28 Minn. 98; S. C., 6 Am. & Eng. Rail. Cas. 264. A railroad company is liable to passers on the highway for a crossing so negligently constructed as to cause injuries to persons lawfully using it: *Roberts v. Chicago R'y Co.*, 25 Wis. 679; *Indianapolis etc. R. R. Co. v. Stout*, 53 Ind. 143; *Judson v. New York etc. R. R. Co.*, 29 Conn. 434; *Maltby v. Chicago etc. R'y Co.*, 52 Mich. 106; S. C., 13 Am. & Eng. Rail. Cas. 606; *Louisville etc. R'y Co. v. Smith*, 91 Ind. 119; S. C., 13 Am. & Eng. Rail. Cas. 608, and annotations 610, 611; as where there is defective planking over a crossing: *Pittsburgh etc. R'y Co. v. Dunn*, 56 Pa. St. 280; *Wasmer v. Delaware etc. R. R. Co.*, 80 N. Y. 212; S. C., 1 Am. & Eng. Rail. Cas. 122; *Payne v. Troy etc. R. R. Co.*, 83 N. Y. 572; S. C., 6 Am. & Eng. Rail. Cas. 54; *Pennsylvania R. R. Co. v. Boylan*, 104 Ill. 595; S. C., 10 Am. & Eng. Rail. Cas. 734; *O'Connor v. Boston etc. R. R. Corp.*, 135 Mass. 352; S. C., 15 Am. & Eng. Rail. Cas. 362; *Kelly v. Southern etc. R. R. Co.*, 28 Minn. 98; S. C., 6 Am. & Eng. Rail. Cas. 264; *Mann v. Central Vermont etc. R. R. Co.*, 55 Vt. 484; S. C., 14 Am. & Eng. Rail. Cas. 620; *Baughman v. Shenango etc. R. R. Co.*, 92 Pa. St. 335; or where rails are maintained at such a height above the level of the crossing as to endanger the safe transit of wagons: *Oliver v. North B. R'y Co.*, L. R. 9 Q. B. 409; *Johnson v. St. Paul etc. R'y Co.*, 31 Minn. 283; S. C., 15 Am. & Eng. Rail. Cas. 467; *Milwaukee etc. R. R. Co. v. Hunter*, 11 Wis. 160; or where the crossing is obstructed by a wreck, in cases where more than a reasonable time has elapsed for the removal of the wreck: *Pittsburgh etc. R'y Co. v. Taylor*, 104 Pa. St. 306; *Paine v. Grand Trunk etc. R'y Co.*, 58 N. H. 611. And where a highway is used as a part of a railroad line, travelers on the highway have a right to cross the railroad line at any point, and not merely at the intersections of other highways; and the railroad company is liable to one injured while crossing at a point other than the intersection of another highway, if the company is in any respect negligent in the operation

of its line: *Louisville etc. R'y Co. v. Head*, 80 Ind. 117; S. C., 4 Am. & Eng. Rail. Cas. 619; *Frick v. St. Louis etc. R'y Co.*, 75 Mo. 595; 8 Am. & Eng. Rail. Cas. 280; *Smedis v. Brooklyn etc. R. R. Co.*, 88 N. Y. 13; S. C., 8 Am. & Eng. Rail. Cas. 445.

6. DUTY OF RAILROAD COMPANY IN OPERATING ITS LINE AT GRADE CROSSINGS.—1. *Relative Rights and Obligations.*—As a general principle, it is the duty of a railroad company to operate its line at grade crossings of highways with due care for the rights of travelers upon such highways. But in the case of collisions between the company's engines and persons crossing the track in carriages or on foot at the intersection of highways, each is exercising an equal legal right, independent of any contract or favor extended by the one to the other. The individual has a right to cross the track, and the company has a right to cross the highway. It is the case of two parties holding equal, independent rights, the exercise of which by one may result in injury to the other, with or without legal liability, according to the conduct of each. The relative rights between the railroad company and strangers are different in degree from those between it and passengers, whose claim have a superadded obligation arising from contract and confidence; and the utmost vigilance and care are to be observed in regard to them. The demand of strangers makes it incumbent on it, upon general principles of humanity, to exercise such reasonable vigilance and care towards them as not to be the occasion of doing them an injury by its negligence which could be avoided by judicious foresight: *Baltimore etc. R. R. Co. v. State*, 29 Md. 252; *Indiana Central R'y Co. v. Hudson*, 13 Ind. 325; *Philadelphia etc. R. R. Co. v. Kerr*, 25 Md. 521. This matter is also governed by that pervading principle of social duty founded on the common law, that every person must so conduct his own affairs as not to injure the rights of another, expressed in the legal maxim, *Sic utere tuo ut alienum non ledas*: See note to *Nolton v. Western R. R. Corp.*, 69 Am. Dec. 628. But while the relative rights and obligations of a railroad company and travelers on the highway are reciprocal, it is the privilege of the railroad company that its trains shall have the right of way, and that all persons on the highway shall yield precedence to the trains: *Pennsylvania R. R. Co. v. Goodman*, 62 Pa. St. 329; *Black v. Burlington etc. R'y Co.*, 38 Iowa, 515; *Galena etc. R. R. Co. v. Dill*, 22 Ill. 264; *Toledo etc. R'y Co. v. Goddard*, 25 Id. 185; *Continental Improvement Co. v. Stead*, 95 U. S. 161.

2. *Degree of Diligence Required of Persons Exercising Independent Rights.*—The measure of a railroad company's duty and liability, in relation to persons lawfully crossing or entering on its track, is the same as that which defines the duty and liability of the owners of carriages which are driven on the highway, or of other parties exercising independent rights. It is bound to use ordinary care to avoid injury to travelers on the highway crossing its track; and, acting through servants, as engineers, conductors, and brakemen, it is responsible for injuries to such travelers arising from a want of ordinary care and skill on the part of its servants; that is, such care and skill as the mass of prudent persons in their business are accustomed to exercise: See principal case; *Beers v. Housatonic R. R. Co.*, 19 Conn. 566; *Cleveland etc. R. R. Co. v. Terry*, 8 Ohio St. 570; *Pendleton St. R. R. Co. v. Shires*, 18 Id. 255; *Bellefontaine R'y Co. v. Snyder*, 24 Id. 670; S. C., 18 Id. 399; *Pendleton St. R. R. Co. v. Stallman*, 22 Id. 1, 19; *State v. Baltimore etc. R. R. Co.*, 24 Md. 84, 103; *Bannon v. Baltimore etc. R. R. Co.*, 24 Id. 108; *Baltimore etc. R. R. Co. v. Bahrs*, 28 Id. 647; *Baltimore etc. R. R. Co. v. State*, 29 Id. 252; *New Orleans etc. R. R. Co. v. Bailey*, 40 Miss. 395; *Wilds v. Hudson R. R. R.*

Co., 24 N. Y. 430; S. C., 29 Id. 315; *Weber v. New York etc. R. R. Co.*, 58 Id. 451; *Show v. Boston etc. R. R. Corp.*, 8 Gray, 45; *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585; *Central etc. R. R. Co. v. Rockafellow*, 17 Id. 541; *Illinois Cent. R. R. Co. v. Phillips*, 49 Id. 234; S. C., 55 Id. 194; *Moore v. Cent. R. R. Co.*, 24 N. J. L. 268; *Cent. R. R. Co. v. Moore*, 24 Id. 824; *Macon etc. R. R. Co. v. Davis*, 18 Ga. 679; *Zeigler v. Northeastern R. R. Co.*, 5 Rich. 221; S. C., 7 Id. 402. Thus in a leading case, which has been frequently cited with approval, it was considered that the highest diligence is not to be exacted of any person, except when a compensation is paid for the service; or when the person injured is in the power and under the control of the defendant, as in the case of passengers in the charge of a common carrier; or when the defendant officiously obtrudes his services upon the plaintiff; or is the only one of two who is to derive a benefit from the act; or is in the wrong place at the time he commits the injury; or engaged in an unlawful calling; but where both parties stand on an equality as to the means of avoiding the accident, and each is engaged in a lawful employment, only ordinary diligence can be required of either: *Brand v. Schenectady etc. R. R. Co.*, 8 Barb. 368. It is sometimes said that railroad companies which use steam as a motive power are required to exercise "the utmost care" to prevent injuries: *Johnson v. Hudson R. R. Co.*, 20 N. Y. 75; *Cook v. New York Cent. R. R. Co.*, 3 Keyes, 479; *Fero v. Buffalo etc. R. R. Co.*, 22 N. Y. 213. But this inexact mode of expression seems to be used to enforce the duty of applying a vigilance and skill adapted to the peculiar dangers which are incident to the use of steam as a motive power, without intending to vary the measure of liability: *Weber v. New York etc. R. R. Co.*, 58 Id. 460-463; *Baltimore etc. R. R. Co. v. State*, 29 Md. 261. But while the same rule of care and skill measures the liability of a railroad company as that of individuals, the consideration should be ever present to its agents and servants that they are dealing with dangerous elements and forces, eminently destructive to human life and limb; and although bound to exercise only reasonable care and skill, except in the carriage of passengers, what will answer that requirement where there is little peril will not where the peril is great. The care and skill, therefore, to be reasonable, must be proportioned to the danger and multiplied chances of injury; and similar precautions are required of persons who have occasion to be in the vicinity of its engines: See principal case; *Beers v. Housatonic R. R. Co.*, 19 Conn. 566; *Runyon v. Cent. R. R. Co.*, 25 N. J. L. 558; *Kennedy v. North Mo. R. R. Co.*, 36 Mo. 351; *Bellefontaine R'y Co. v. Snyder*, 38 Ohio St. 676, 677; S. C., 18 Id. 399. To discuss the duty of the traveler to use his senses in order to avoid danger at grade-crossings would lead us too far into the subject of contributory negligence, which cannot be profitably treated within the limits of this note, and must therefore be omitted, except a mere reference to *Pennsylvania R. R. Co. v. Ogier*, 78 Am. Dec. 322, note 327; notes to *Warren v. Fitchburg R. R. Co.*, 85 Id. 706, 707; note to *Philadelphia etc. R. R. Co. v. Spearen*, 86 Id. 552; but it may be said that the traveler has a right to assume that the railroad company will exercise the care and take the precautions which the law imposes upon it: *Robinson v. Western etc. R. R. Co.*, 48 Cal. 421.

3. *General Duty of Railroad Company to Travelers on Highway.*—The company is bound to use every reasonable precaution to prevent injury to travelers on the highway, but not every possible one: *Weber v. New York etc. R. R. Co.*, 58 N. Y. 462. Thus the placing of a man as a guard on each car of a freight train to give and repeat signals is not ordinarily required: *Chicago etc. R. R. Co. v. Stumps*, 55 Ill. 367. If the company in the manage-

ment of its train causes unusual peril to travelers, it should meet such peril by corresponding precautions: *Klein v. Jewett*, 26 N. J. Eq. 474, 479, 480; S. C., 27 Id. 550. The duty of the company to use reasonable precautions to prevent injury extends to travelers on foot as well as to those riding in carriages: *Cheney v. New York etc. R. R. Co.*, 16 Hun, 415. Exercise of ordinary care will, however, enable a person to cross a railroad track on foot in open daylight with safety, and it requires a strong case to sustain an action under such circumstances: *Cordell v. New York Cent. R. R. Co.*, 70 N. Y. 125. It is negligence in a person on foot to attempt to cross the street in front of cars or carriages drawn by horse power on a nice calculation of the chances of a collision; but the question of his negligence becomes one for the jury where the facts tend to show that in taking the risk he was in the exercise of ordinary care: *Belton v. Baxter*, 58 Id. 411; S. C., 54 Id. 245; *Thurber v. Harlem etc. R. R. Co.*, 60 Id. 326; *O'Donnell v. New York etc. R. R. Co.*, 8 Daly, 409. He is not required to anticipate the possibility of an accidental fall while he is crossing: *Mentz v. Second Av. R. R. Co.*, 3 Abb. App. 274. The railroad company may within its location erect buildings and pile rubbish or materials derived from excavations which obstruct the traveler's view of approaching trains; but it is bound to take the precautions and give the warnings which the peculiar dangers resulting from such obstruction of view reasonably require: *Cordell v. New York etc. R. R. Co.*, 75 N. Y. 330; S. C., 70 Id. 119; 64 Id. 535; S. C., 26 Am. Rep. 550; and extended notes to *Louisville etc. R. R. Co. v. Commonwealth*, 26 Id. 207-211; *McAlpin v. Powell*, 26 Id. 562-567, treating of the subject considered in this note; *Mackay v. New York Cent. R. R.*, 35 N. Y. 75; *Richardson v. New York Cent. R. R. Co.*, 45 Id. 848. Such use of the location, however, is not negligence *per se*, or in itself a cause of action: *Cordell v. New York etc. R. R. Co.*, 75 Id. 330; S. C., 70 Id. 119; 64 Id. 535; 26 Am. Rep. 550; and extended notes to *Louisville etc. R. R. Co. v. Commonwealth*, 26 Id. 207-211; *McAlpin v. Powell*, 26 Id. 562-567; *Central R. R. Co. etc. v. Feller*, 84 Pa. St. 228. In general, it may be said that where the surrounding circumstances render the crossing specially dangerous to travelers on the highway, on account of its locality or mode of construction, or where the line is curved, or there are obstructions to the view, it is the duty of the railroad company to take precautions commensurate to the danger, and it is for the jury to determine whether or not the absence of any particular precaution is negligence: *Indianapolis etc. R. R. Co. v. Stables*, 62 Ill. 313; *Pennsylvania R. R. Co. v. Matthews*, 36 N. J. L. 531; *Duffy v. Chicago etc. R'y Co.*, 32 Wis. 269; *Arts v. Chicago etc. R. R. Co.*, 34 Iowa, 153; S. C., 38 Id. 293; 44 Id. 234; *Peoria etc. R. R. Co. v. Neill*, 88 Ill. 529; *Dimick v. Chicago etc. R'y Co.*, 80 Id. 338; *Central R. R. Co. etc. v. Feller*, 84 Pa. St. 228; *Continental Improvement Co. v. Stead*, 95 U. S. 161; *Mackay v. New York Cent. R. R. Co.*, 35 N. Y. 75; *Richardson v. New York Cent. R. R. Co.*, 45 Id. 846; *Fumston v. Chicago etc. R'y Co.*, 61 Iowa, 452; S. C., 14 Am. & Eng. Rail. Cas. 640; *Nehras v. Central Pacific R. R. Co.*, 62 Cal. 320; *Roberts v. Chicago etc. R'y Co.*, 35 Wis. 679; *Eliert v. Green Bay etc. R. R. Co.*, 48 Id. 606. The duty of the company to avail itself of well-tested inventions and improvements which materially contribute to safety has been much considered with reference to its passengers: *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Smith v. New York etc. R. R. Co.*, 75 Am. Dec. 305, note 310; but it is a duty which extends also to other persons rightfully using or crossing its track: *Smith v. New York etc. R. R. Co.*, 19 N. Y. 127; *Gagg v. Vetter*, 41 Ind. 228. Thus it should use the brakes which are found to be the most efficient for stopping the trains: *Costello v. Syracuse etc. R. R. Co.*, 65 Barb. 92. A railroad com-

pany is required to use a greater degree of care in running its trains through cities and villages than in the open country: See note to *Fero v. Buffalo etc. R. R. Co.*, 78 Am. Dec. 185.

4. *Notice of Approach.* — The effect of the railroad company's non-performance of the duty of giving notice of the approach of its trains towards a grade crossing, when that duty is regulated by statute, depends upon the terms of the particular statute; but generally speaking, statutory directions as to giving notice of the approach of a train towards a crossing must be followed, and a failure to follow them is negligence as to persons on the highway injured while crossing the line: *Atlanta etc. R. R. v. Wyly*, 65 Ga. 120; S. C., 8 Am. & Eng. Rail. Cas. 262; *Peart v. Grand Trunk R'y Co.*, 10 Ont. App. 191; S. C., 19 Am. & Eng. Rail. Cas. 239; *Leavenworth etc. R. R. Co. v. Rice*, 10 Kan. 426; *Central etc. R. R. Co. v. Phillips*, 20 Id. 13; *Missouri etc. R'y Co. v. Wilson*, 28 Id. 637; *Faber v. St. Paul etc. R'y Co.*, 29 Minn. 465; S. C., 8 Am. & Eng. Rail. Cas. 277; *Augusta etc. R. R. Co. v. McElmurry*, 24 Ga. 75; *Wabash R'y Co. v. Henke*, 91 Ill. 406; and it has been held that the railroad company's omission to give the statutory signals is negligence as to persons whose horses, while on the highway, are frightened by the approach of a train: *Cogrove v. New York etc. R. R. Co.*, 87 N. Y. 88; S. C., 6 Am. & Eng. Rail. Cas. 35; *Ransom v. Chicago etc. R'y Co.*, 62 Wis. 178; S. C., 19 Am. & Eng. Rail. Cas. 16; *Rosenberger v. Grand Trunk R'y Co.*, 8 Ont. App. 482; S. C., 15 Am. & Eng. Rail. Cas. 448; *Grand Trunk R'y Co. v. Rosenberger*, 9 Can. S. O. 311; S. C., 19 Am. & Eng. Rail. Cas. 8; and generally, that the omission of such signals is negligence as to all persons who, being lawfully at or near a crossing, are exposed to injury by reason of the failure to give such signals: *Wakefield v. Connecticut etc. R. R. Co.*, 87 Vt. 330; *Hart v. C. etc. R'y Co.*, 56 Iowa, 166; S. C., 41 Am. Rep. 93. The railroad company may, of course, excuse its non-performance of the statutory duty by showing that the duty was on the particular occasion omitted within the bounds of a municipality whose ordinances lawfully forbade the giving of signals within its limits: *Pennsylvania Co. v. Henell*, 70 Ind. 569; S. C., 6 Am. & Eng. Rail. Cas. 79. There are some authorities for the proposition that when a railroad company has followed the statutory directions as to giving signals, etc., it has discharged its whole duty in the premises: *Beisiegel v. New York Cent. R. R. Co.*, 40 N. Y. 9; *Grippen v. New York Cent. R. R. Co.*, 40 Id. 34; *Chicago etc. R. R. Co. v. Robinson*, 106 Ill. 142; S. C., 13 Am. & Eng. Rail. Cas. 620; *Chicago etc. R. R. Co. v. Dougherty*, 110 Ill. 521; S. C., 19 Am. & Eng. Rail. Cas. 292; but the sounder doctrine would seem to be that compliance with such statutory regulations does not necessarily relieve the railroad company from the necessity of taking such additional precautions as are essential to the safety of passers on the highway: *Richardson v. New York Cent. R. R. Co.*, 45 N. Y. 846; *Eaton v. Fitchburg R. R. Co.*, 129 Mass. 364; S. C., 2 Am. & Eng. Rail. Cas. 183; *Barry v. New York Cent. R. R. Co.*, 92 N. Y. 289; S. C., 13 Am. & Eng. Rail. Cas. 615; *Bradley v. Boston etc. R. R.*, 2 Cush. 539. Even when there is no statutory requirement as to notice of a train's approach towards a crossing, a railroad company is negligent if notice is not given of the approach of its trains towards a level crossing; and it is for the jury to determine what notice is reasonable under the circumstances of the particular crossing: *Tolman v. Syracuse etc. R. R. Co.*, 98 N. Y. 198; *Loucks v. Chicago etc. R'y Co.*, 31 Minn. 526; S. C., 19 Am. & Eng. Rail. Cas. 305; *Guggenheim v. Lake Shore etc. R. R. Co.*, 57 Mich. 488; S. C., 22 Am. & Eng. Rail. Cas. 546; *Kelly v. St. Paul etc. R'y Co.*, 29 Minn. 1; S. C., 6 Am. & Eng. Rail. Cas. 93; *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. St. 60; *Philadelphia etc.*

R. R. Co. v. Hagan, 47 Id. 244; *Longenecker v. Pennsylvania R. R. Co.*, 105 Id. 328; *Pittsburg R'y Co. v. Dunn*, 56 Id. 280; *Remoick v. N. Y. Cent. R. R. Co.*, 36 N. Y. 132; *O'Mara v. Hudson R. R. Co.*, 38 Id. 445.

5. *Speed of Trains.* — Where a railroad line crosses a highway in, or in the neighborhood of, a town, and the crossing is not protected by a gate, or by the presence of a watchman, it is the duty of the company to so moderate and control the speed of its trains that the sound of the whistle or bell of the engine will be an effectual warning to persons on the highway: *Continental Improvement Co. v. Stead*, 95 U. S. 161; *Pennsylvania R. R. Co. v. Ackerman*, 74 Pa. St. 285; *Pennsylvania R. R. Co. v. Lewis*, 79 Id. 33; *Philadelphia etc. R. R. Co. v. Long*, 75 Id. 257; *Quimby v. Vermont Cent. R. R. Co.*, 23 Vt. 387; *State v. Baltimore etc. R. R. Co.*, 24 Md. 84; *Wilson v. Cunningham*, 3 Cal. 241; but aside from statutory or municipal regulation, no rate of speed, however high, is negligence *per se*: *Reading etc. R. R. Co. v. Ritchie*, 102 Pa. St. 425; S. C., 19 Am. & Eng. Rail. Cas. 267, and numerous citations in note thereto 275; *Goodwin v. Chicago etc. R. R. Co.*, 75 Mo. 73; S. C., 11 Am. & Eng. Rail. Cas. 460; *Powell v. Missouri etc. R'y Co.*, 76 Mo. 80; S. C., 8 Am. & Eng. R. R. Cas. 467; *Wallace v. St. Louis etc. R'y Co.*, 74 Mo. 594. Neither is a railroad company bound to run its trains at such a moderate rate of speed that they can be stopped within the distance in which obstacles on the line can be discovered at night by the headlight: *Louisville etc. R. R. Co. v. Milan*, 13 Am. & Eng. Rail. Cas. 507. If the crossing be a specially dangerous one, it is negligence in the railroad company if its train approaches the crossing at the rate permitted by statute, provided that rate be in excess of that which a due regard for the safety of the public requires: *Shaber v. St. Paul etc. R'y Co.*, 28 Minn. 103; S. C., 2 Am. & Eng. Rail. Cas. 185; and it is for the jury to determine whether or not the rate of speed of the train be negligent with reference to the more or less dangerous character of the crossing: *Frick v. St. Louis etc. R'y Co.*, 75 Mo. 595; S. C., 8 Am. & Eng. Rail. Cas. 230; *Louisville etc. R. R. Co. v. Goetz's Adm'rs*, 79 Ky. 442; S. C., 14 Am. & Eng. Rail. Cas. 648; *Klanowski v. Grand Trunk R'y Co.*, 57 Mich. 525; S. C., 21 Am. & Eng. Rail. Cas. 648; *Terre Haute etc. R. R. Co. v. Clark*, 73 Ind. 168; S. C., 6 Am. & Eng. Rail. Cas. 84; *Indianapolis etc. R. R. Co. v. McLin*, 82 Ind. 435; S. C., 8 Am. & Eng. Rail. Cas. 237; *Salter v. Utica etc. R. R. Co.*, 88 N. Y. 42; S. C., 8 Am. & Eng. Rail. Cas. 437; *Meyer v. Midland etc. R. R. Co.*, 2 Neb. 319; *Langhoff v. Milwaukee etc. R'y Co.*, 19 Wis. 489; *Wilds v. Hudson R. R. Co.*, 29 N. Y. 315; *Massoth v. Delaware etc. Canal Co.*, 64 Id. 524, 531.

6. *Sign-boards, Gates, and Flagmen at Crossings.* — *Lights on Cars and Engines.* — It is for the jury to say whether the omission to have a sign-board at a level crossing to warn persons approaching of its presence is negligence: *Shaber v. St. Paul etc. R'y Co.*, 28 Minn. 103; S. C., 2 Am. & Eng. Rail. Cas. 185; but the failure of a railroad company to maintain sign-boards at a crossing is not negligence as to persons who in fact know of the existence and the location of the crossing: *Haas v. Grand Rapids etc. R. R. Co.*, 47 Mich. 401; S. C., 8 Am. & Eng. Rail. Cas. 268. Outside of statutory and municipal regulations, there is no rule of law which requires railroad companies to maintain gates at all crossings: *Stapley v. London etc. R'y Co.*, L. R. 1 Ex. 13; nor flagmen at all crossings: *Beisiegel v. New York Cent. R. R. Co.*, 40 N. Y. 9; *Pakalinsky v. New York Cent. R. R. Co.*, 82 N. Y. 424; S. C., 2 Am. & Eng. Rail. Cas. 251; *Maryland Cent. R. R. Co. v. Neuben*, 62 Md. 39; S. C., 19 Am. & Eng. Rail. Cas. 261; *State v. Philadelphia etc. R. R. Co.*, 47 Md. 76; *Pennsylvania R. R. Co. v. Matthews*, 36 N. J. L. 531; *McGrath v. New*

York Cent. etc. R. R. Co., 59 N. Y. 468; S. C., 17 Am. Rep. 369, and extended note thereto 363-368; S. C., 63 Id. 522; *Weber v. New York Cent. etc. R. R. Co.*, 58 Id. 459. If it be proved, however, that the crossing at which occurred the injury sued for is of such a character that the posting of a flagman was necessary to the safety of travelers on the highway, and would have prevented the particular injury, the jury may then find negligence on the part of the railroad in its failure to post a flagman there: *Eaton v. Fitchburg R. R. Co.*, 129 Mass. 364; S. C., 2 Am. & Eng. Rail. Cas. 183; *Kansas Pacific R'y Co. v. Richardson*, 25 Kan. 391; S. C., 6 Am. & Eng. Rail. Cas. 96; *Kinney v. Crocker*, 18 Wis. 74; *Welch v. Hannibal etc. R. R. Co.*, 72 Mo. 451; S. C., 6 Am. & Eng. Rail. Cas. 75; 37 Am. Rep. 440, and extended note thereto 443-446. Where a railroad company does employ a flagman at a crossing, his failure to perform the duties of his post is negligence on the part of the company: *Kissenger v. New York etc. R. R. Co.*, 56 N. Y. 543; *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 368; S. C., 87 Am. Dec. 644; *Dolan v. Delaware etc. Canal Co.*, 71 N. Y. 285; and the withdrawal of the flagman by the railroad company without notice to the public is negligence on the part of the company: *Pittsburgh etc. R'y Co. v. Yundt*, 78 Ind. 373; S. C., 3 Am. & Eng. Rail. Cas. 502; but whatever may be the character of the crossing, the failure to post a flagman is not negligence as to persons whose injuries are not due to the absence of the flagman: *Pennsylvania Co. v. Hensel*, 70 Ind. 569; S. C., 6 Am. & Eng. Rail. Cas. 79. Where a railroad company has, in obedience to statutory requirements, erected gates at a level crossing, the fact that the gates are open is an invitation to cross, and an assurance that the line can be safely crossed: *Stapley v. London etc. R'y Co.*, L. R. 1 Ex. 21; *Wanless v. North Eastern R'y Co.*, L. R. 6 Q. B. 481; *Sharp v. Glushing*, 96 N. Y. 676; S. C., 19 Am. & Eng. Rail. Cas. 372; and when the company's gate-keeper, flagman, or train hand invites a traveler on the highway to cross the line, the traveler is not bound to exercise the same degree of care which he would be expected to exercise if no such invitation were given: *Lunt v. London etc. R'y Co.*, L. R. 1 Q. B. 277; but such an invitation by a servant of the railroad company will not excuse a failure by the injured person to exercise any care for his own safety: *Philadelphia etc. R. R. Co. v. Boyer*, 97 Pa. St. 91; S. C., 2 Am. & Eng. Rail. Cas. 172. It is the duty of gatemen to close the gates when a train approaches a crossing, and the railroad company is not liable to a traveler on the highway who is injured while attempting to drive across the line before a moving train, by the wheel of his carriage being caught in the closing gate: *Peck v. New York etc. R. R. Co.*, 50 Conn. 379. It is the duty of a railroad company to adequately light its engines and cars at night by the use of the best appliances in practical use: *Nashville etc. R. R. Co. v. Smith*, 6 Heisk. 174; *Smedis v. Brooklyn etc. R. R. Co.*, 88 N. Y. 13; S. C., 8 Am. & Eng. Rail. Cas. 445; but the company is not to be held liable for injuries that result without negligence on its part from the light becoming obscured by the operation of natural causes, as where the headlight of a locomotive became so obscured by a driving mist that an obstruction on the line could not be seen by the engine driver: *L. etc. R. R. Co. v. Melton*, 2 Lea, 262.

7. *Negligence per se, and Other Matters.*—The duty incumbent on the railroad company to cause its trains to approach and pass the crossing with care also requires a careful operation of the line in other respects from those above stated. Thus trains should not pass each other at dangerous speed on the crossing: *New Jersey R. R. Co. v. West*, 32 N. J. L. 91. Extraordinary precautions should be taken if a train or an engine is to be backed over a crossing:

Hutchinson v. St. Paul etc. R'y Co., 32 Minn. 398; S. C., 19 Am. & Eng. Rail. Cas. 280; *Johnson v. St. Paul etc. R. R. Co.*, 31 Minn. 283; S. C., 15 Am. & Eng. Rail. Cas. 467; *Levoy v. M. R'y*, 3 Ont. 623; S. C., 15 Am. & Eng. Rail. Cas. 478; *Howard v. St. Paul etc. R'y Co.*, 32 Minn. 214; S. C., 19 Am. & Eng. Rail. Cas. 283; *Maginnis v. New York Cent. R. R. Co.*, 52 N. Y. 215; *Kissenger v. New York etc. R. R. Co.*, 56 Id. 538; *Savannah etc. R. R. Co. v. Shearer*, 58 Ala. 672; and especial care must be observed where cars are to be kicked or sent on a flying or running switch over a crossing: *Howard v. St. Paul etc. R'y Co.*, 32 Minn. 214; S. C., 19 Am. & Eng. Rail. Cas. 283; *Pennsylvania R. R. Co. v. State*, 61 Md. 106; S. C., 19 Am. & Eng. Rail. Cas. 326; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; *Ferguson v. Wisconsin Cent. R. R. Co.*, 63 Wis. 145; S. C., 19 Am. & Eng. Rail. Cas. 285; *Butler v. Milwaukee etc. R'y Co.*, 28 Wis. 487; *Brown v. New York Cent. R. R.*, 32 N. Y. 600; S. C., 87 Am. Dec. 353; *Illinois Cent. R. R. Co. v. Baches*, 55 Ill. 379; *Chicago etc. R. R. Co. v. Garoy*, 58 Id. 83; but the backing of a train or engine over a crossing, or the passing of a crossing by cars on a running or flying switch, cannot properly be said to be negligent if precautions commensurate with the danger are observed by the railroad company: *Bohan v. Milwaukee etc. R'y Co.*, 58 Wis. 30; S. C., 15 Am. & Eng. Rail. Cas. 374; *Hogan v. Chicago etc. R'y Co.*, 59 Id. 139; S. C., 19 Am. & Eng. Rail. Cas. 276; *Bohan v. Milwaukee etc. R'y Co.*, 61 Wis. 391; S. C., 19 Am. & Eng. Rail. Cas. 276. The following matters have been deemed negligence: Thus, pushing a train back by a locomotive in a reverse position, *Chicago etc. R. R. Co.*, 38 Ill. 482, without further notice than if the movement were forward; the running of a train without a sufficient number of brakemen: *Toledo etc. R'y Co. v. McGinnis*, 71 Id. 346; *Kansas Pacific R'y Co. v. Pointer*, 9 Kan. 620; S. C., 14 Id. 37; or without an experienced engineer in a much frequented place: *O'Mara v. Hudson R. R. Co.*, 38 N. Y. 445; sending a car around a curve or down grade without a brakeman at a place where the company allowed the public to pass: *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; and sending a car at night across a frequented street without a brakeman or a light: *Chicago etc. R. R. Co. v. Garoy*, 58 Ill. 83. The servants on the train must be vigilant and attentive to their duties when the train approaches a crossing: *St. Louis etc. R'y Co.*, 50 Ind. 65; *Frick v. St. Louis etc. R'y Co.*, 75 Mo. 595; S. C., 8 Am. & Eng. Rail. Cas. 280; and the presence of strangers in the cab of the engine as it approaches a crossing may properly be held to be negligence on the part of the railroad company, on the ground that their presence diverts the attention of the engine driver and fireman, when their attention should be concentrated on the performance of their duties: *Marcott v. Marquette etc. R. R. Co.*, 47 Mich. 1; S. C., 4 Am. & Eng. Rail. Cas. 548. And some courts have held that it is negligence in the railroad company to let weeds and brush grow, or to pile them within the location, so as to obstruct the traveler's view: *Rockford etc. R. R. Co. v. Hillmer*, 72 Ill. 235; *Indianapolis etc. R. R. Co. v. Smith*, 78 Id. 112; *Dimick v. Chicago etc. R'y Co.*, 80 Id. 338; *Chicago etc. R. R. Co.*, 87 Id. 454. The company must keep their road-bed in repair, especially in the streets of a city, and are liable for injuries caused by want of such repair if there was no negligence on the part of the party injured: *Oakland R'y Co.*, 48 Pa. St. 320; *Inhabitants of Veazie*, 49 Me. 119; *Burritt v. City of New Haven*, 42 Conn. 174; *New York Cent. R. R. Co. v. Gale*, 76 N. Y. 594; S. C., 13 Hun, 1; *Lyon v. St. Louis etc. R. R. Co.*, 6 Mo. App. 516. And where one, though not a passenger, is injured by a railroad train, the laws of humanity require those in charge to so far care for the injured person as to place him, if practicable, in a safe place, where he may be cared for: *Northern Cent. R'y Co. v.*

State, 29 Md. 420; *Baltimore etc. R. R. Co. v. State*, 41 Id. 268; *Philadelphia etc. R. R. Co. v. Derby*, 24 How. 483. The company is liable to one at a depot, not a passenger, for injuries caused by the explosion of a steam-boiler: *Illinois Cent. R. R. Co. v. Phillips*, 55 Ill. 194; S. C., 49 Id. 234. It has been held that the railroad company is liable for injuries to persons accompanying passengers to the cars, or meeting them there; and that the company was also liable for its negligence to a hackman who had driven a passenger to the railroad station. But it seems that such persons are entitled to demand of the company the same measure of duty which they owe to passengers. As to meeting or seeing departing friends off, see *McKone v. Mich. Cent. R. R. Co.*, 51 Mich. 601; S. C., 13 Am. & Eng. Rail. Cas. 29; 47 Am. Rep. 596; *Langan v. St. Louis etc. R'y Co.*, 72 Mo. 392; S. C., 3 Am. & Eng. Rail. Cas. 355; *Stiles v. Atlanta etc. R. R.*, 65 Ga. 370; S. C., 8 Am. & Eng. Rail. Cas. 195; *Dass v. Missouri etc. R. R. Co.*, 59 Mo. 27; S. C., 8 Am. R'y Rep. 462; *Hamilton v. Texas etc. R'y Co.*, 64 Tex. 251; S. C., 21 Am. & Eng. Rail. Cas. 336; 53 Am. Rep. 756; *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129. As to hackmen, see *Tobin v. Portland etc. R. R. Co.*, 59 Me. 183. That railway owes higher measure of duty to children, see *Rauch v. Lloyd*, 72 Am. Dec. 747, note 787. The whole subject of railway accident law is concisely and accurately treated by Patterson in his late work on that subject, and which we have freely used in the preparation of this note.

NORTH BALTIMORE BUILDING ASSOCIATION v. CALDWELL.

[25 MARYLAND, 420.]

TRUSTEE APPOINTED BY COURT OF EQUITY TO SELL REAL ESTATE CANNOT BUY AT SUCH SALE, either on his own account or as the agent of a third person.

APPEAL from an order setting aside a sale made by a trustee under proceedings to foreclose a mortgage. The property had been sold to the North Baltimore Building Association, the mortgagee. It was contended that the trustee, as the agent of the association, bid for and purchased the property.

William A. Stewart, for the appellant.

Robert D. Morrison and John H. Warner, for the appellee.

By Court, BOWIE, C. J. The single question in this case is, whether it is compatible with the duty of a trustee, appointed by decree of a court to sell real estate, to bid for and purchase the property for a third person at a public sale of the same under the decree.

It is admitted that the general principles of law preclude a purchase by the trustee for his own benefit, but it is contended

the rule extends no further, and no decisions to the contrary are to be found in this state. The general rule of law and equity, and its reasons, are very concisely and clearly expressed by Chancellor Kent in his Commentaries, vol. 2, 6th ed., p. 618.

"An agent, acting as such, cannot take upon himself at the same time an incompatible duty. He cannot have an adverse interest or employment. He cannot be both buyer and seller, for this would expose his fiduciary trust to abuse and fraud." Also Story on Agency, 199, 200. Among other reasons assigned for setting aside a sale where the trustee appeared as a bidder was this, viz.: "If the trustee appeared at the auction professedly as a bidder, that would operate as a discouragement to others, who, seeing the vendor ready to purchase at or above the real value, would feel a reluctance to enter into the competition, and so the sale would be chilled": *Ex parte Lacey*, 6 Ves. 625, 627; Lewin on Trusts, 377, note c.

In the last authority, it is laid down as a legal conclusion, as a trustee cannot buy on his own account, it follows that he cannot be permitted to buy as agent for a third person; the court can with as little effect examine how far the trustee has made an undue use of information acquired by him in the course of his duty in the one case as in the other": *Vide Ex parte Bennett*, 10 Ves. 381; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Hawley v. Kramer*, 4 Cow. 734. It needs no elaboration to enforce these views or to show the antagonism between the interest of the vendor and the vendee. Although the facts of this case do not warrant (and the counsel of the caveators expressly disclaim all imputation of improper motive in the trustee), yet the principle is too important to be departed from in the most unexceptionable cases. The order of the court below will therefore be affirmed, with costs of this court to the appellee, and the cause remanded.

Cause remanded.

TRUSTEE CANNOT SELL AND BUY SAME PROPERTY: *Tisdale v. Tisdale*, 64 Am. Dec. 775; *Jewett v. Miller*, 61 Id. 751, note 756. A trustee can never under power of sale become the purchaser of the trust estate, either directly or indirectly: *Imboden v. Hunter*, 79 Id. 116, note 122; *Hoffman Steam Coal Co. v. Cumberland Coal etc. Co.*, 77 Id. 311.

BRYSON v. RAYNER.

[25 MARYLAND, 424.]

VALID PUBLIC SALE OF STOCK.—Where a pledgee, at the public stock board, sells stock which he has taken and held as collateral security for loans made to the pledgor, the transaction constitutes a valid public sale, where no fraud appears in it.

IN ABSENCE OF SPECIAL AUTHORITY, IT IS DUTY OF PLEDGEE OF HYPOTHECATED STOCK TO DISPOSE OF IT AT PUBLIC SALE, after a reasonable notice to the public of the time and place of sale, or at the public stock board; but special authority will enable the pledgee to sell at private sale and without notice.

IF PLEDGEE OF HYPOTHECATED STOCK SELLS IT AT PUBLIC STOCK BOARD, UPON PLEDGOR'S FAILURE TO REDEEM, and himself becomes the purchaser thereof, and continues to hold such stock, he will be regarded as still maintaining the character of bailee, and as holding the pledge to secure the payment of the loan with interest, and will be required to account for all dividends on the stock received by him in the mean time.

IF PLEDGOR OF HYPOTHECATED STOCK GIVES PLEDGEE WRITTEN AUTHORITY TO SELL SUCH PLEDGE in case it is not redeemed at a day specified, or to give the same "to any broker to sell on that day," and the pledge is not redeemed on the day specified, a sale made by a broker thereafter at private sale, for the full market price of the stock at that date, is in conformity with the authority, and valid.

WHERE ARTICLE PLEDGED IS SPECIFIC CHATTEL, THERE IS AMPLE REMEDY AT LAW BY REPLEVIN if the pledgee retains the possession, or by *trover* or *assumpsit* in case he has parted from it.

EQUITY ALONE CAN AFFORD RELIEF, BY ORDERING RETRANSFER OF PLEDGED STOCK OF INCORPORATED COMPANY, where the shares have been transferred upon the books of the corporation, and stand in the name of the pledgee as legal owner. The law falls short of the remedy to which the pledgor is entitled.

ANALOGY BETWEEN PLEDGE OF STOCK GIVEN AS COLLATERAL SECURITY AND MORTGAGE.—Although a pledge is not technically a mortgage, the subject of it not having been assigned or transferred by an instrument known to the law as such, with a condition of defeasance, yet, where it is given as a security for debt, it partakes of the nature of a mortgage, and is subject to some of its incidents, including the right of redemption, and no good reason exists why equity should withhold its aid from the pledgor seeking a return of the pledge in a case where the law cannot restore it.

PLEDGOR, ON PAYMENT OF DEBT OR TENDER, IS ENTITLED TO RETURN OF IDENTICAL PROPERTY PLEDGED, and equity may be invoked for this purpose where the law fails.

IF PAWNEE HAS TWO REMEDIES, TO SELL AT LAW AFTER 'DEFAULT AND NOTICE, OR TO FORECLOSE IN EQUITY, no reason exists why a pledgor should not be furnished with the equitable remedy to redeem.

EQUITY WILL TAKE JURISDICTION TO PREVENT MULTIPLICITY OF SUITS. Where a pledgor's bill of complaint seeking a return of pledged stock also prays for an account of receipts and dividends, equity has jurisdiction, though the law could afford a remedy by *assumpsit* if a recovery of

the receipts and dividends were sought alone, particularly where it would require a multiplicity of suits at law to effect the relief asked by the bill.

BILL of complaint to compel the appellee to return to the appellant nineteen shares of the stock of the Powhatan Steamboat Company, transferred to him as collateral security for the repayment of a loan. The bill was dismissed, on the ground that the case presented no fact authorizing the interposition of a court of equity. From that decree this appeal was taken. Other facts are stated in the opinion.

George H. Williams, for the appellant.

Benjamin F. Horwitz, for the appellee.

By Court, WEISEL, J. In the cases of the President and Directors of the Maryland Fire Insurance Company [89 Am. Dec. 779] and the Baltimore Marine Insurance Company against William F. Dalrymple [see 89 Am. Dec. 791], this court fully considered the duties and responsibilities of the pledgee of stocks taken and held as collateral securities for loans made to the pledgor. In those cases we decided that a sale of such stock at the public stock board, no fraud appearing in the transaction, was a valid public sale in Maryland; that if the pledgee purchased at such sale, and afterwards continued to hold the stock, he was to be regarded as still standing in the relation of bailee, and responsible for all the duties and liabilities incident to it; or in other words, the bailment was not by that act alone broken up and destroyed.

In the cause now under consideration, there were two loans to the appellant by the appellee, in February and April, 1861; one of \$1,000 upon a pledge of ten shares of the Powhatan Steamboat Company; the other of \$945 on a pledge of nine other shares of stock of the same company. Loan papers were executed in the usual form, and the borrower failing to comply with the terms, the appellee applied for payment. With regard to the nine shares, and the loan which they were given to secure, Mr. Bryson, in writing signed by him, expressly authorized the appellee to sell them in case they were not redeemed by a certain day named in the authority, and if not redeemed on that day, he was "authorized to give the stock to any broker to sell on said day." The money not being paid on the day specified, the appellee afterwards handed the stock to a broker to make sale of the same. The broker

effected this at private sale, and for the full price that the stock then commanded in the Baltimore market. The net proceeds, however, failed to pay the debt by \$51.43, of which, with a statement of sale, the appellant was duly notified.

The only question which can arise as to this particular transaction is, whether the written authority to sell authorized the pledgee to sell at private sale or any way by a broker the nine shares. In the absence of this special authority, according to the rulings of this court in the cases referred to, it would have been the duty of the pledgee to have disposed of the stock at public sale, after a reasonable notice to the public of the time and place of sale, or at the public stock board. We think the paper referred to was intended to enlarge the power, and to enable the pledgee to sell at private sale, and without notice; otherwise it would have been unnecessary, as the power to sell at public sale existed without it, and a prompt sale by the broker on the day he received it for the purpose would not admit of notice. We construe it as a general authority to sell by a broker at private sale or in any other way, and are of opinion that the sale made by the broker of the nine shares as proved by him was in conformity with its terms, and valid. This disposes of so much of the case as relates to those shares, and as to them the relief sought was properly denied.

The other lot of ten shares was offered at the brokers' board, and purchased in for the appellee, Rayner, who, according to the proof of Mr. Claggett, the clerk of the Powhatan Steamboat Company, still holds them. Mr. Rayner asserts that by the sale he became the owner of them, and that he is entitled to all dividends since, and not liable to account for the same. This assertion of right and claim is at variance with what we have decided in the cases against Dalrymple, already referred to, and we regard him as still maintaining, as to these ten shares, the character of a bailee. They must be considered still as collaterals in his hands to secure the payment of the thousand-dollar loan and all interest upon it, all moneys and dividends received upon them by Rayner whilst in his hands to be properly accounted for by him.

But he contends through his counsel that if the appellant is aggrieved, his remedy was ample at law, and that equity can afford him no relief. This position is based upon the technical distinction between a mortgage and a pledge, it being conceded that if the stock had been mortgaged the right to redeem in equity would be indisputable, but as the relation

between bailor and bailee is a legal relation, and only a qualified property passed to the bailee by the transfer of the stock to him, the remedy for any violation of the contract or tortious dealing with the property is at law by an action of trover or *assumpsit*; and the learned judge below, adopting this view, and considering that there was nothing in the case that could properly work a change of the jurisdiction, dismissed the bill of the complainant on this ground. In this, we think he committed an error, and that the complainant was entitled to the relief he sought as to the ten shares of stock.

Although a pledge is not technically a mortgage, the subject of it not having been assigned or transferred by an instrument known to the law as such, with a condition of defeasance, yet it is given in certain cases, as in this, as a security for debt, and therefore partakes of the nature of a mortgage. It is also subject to redemption. The pledgor, on payment of the debt or tender, is entitled to a return of the identical property pledged, and there can be no good reason why equity should withhold its aid for this purpose in a case in which the law cannot accomplish it. Where the article pledged is a specific chattel, the law can afford an ample remedy by replevin if the pledgee retains the possession, or by trover or *assumpsit* in case he has parted from it. But in a case like the present,—that of stock of an incorporated company,—when the shares have been transferred upon the books of the corporation, and stand in the name of the pledgee as legal owner, the law falls short of the remedy asked and to which the pledgor is entitled. Equity alone in such a case can afford relief, by an order of retransfer. If a pawnee has two remedies,—to sell at law after failure and notice, or to foreclose in equity (2 Kent's Com. 582, 583),—no reason exists why the pledgor should not be furnished with the equitable remedy to redeem.

The bill in this case also prayed for an account of receipts and dividends, and although the law could afford a remedy by *assumpsit* if a recovery of the receipts and dividends were sought alone, equity has also jurisdiction, and more particularly where the relief asked by the bill could not have been effected at law but by a multiplicity of suits: Story's Eq. Jur., secs. 442, 457. The cases of *Ryal v. Roberts*, 3 Barn. 38, *Hart v. Ten Eyck*, 2 Johns. Ch. 100, and cases there referred to, and *Hasbrouck v. Vandevort*, 4 Sand. 78, are fully to the point, whilst that of *Wilson v. Little*, 2 N. Y. 448 [51 Am. Dec. 307], does not conflict with the law as applicable to this case.

The appellant is, in our opinion, entitled to the relief he asks as to the ten shares of stock. We will reverse the decree of the court below, with costs to the appellant, and remand the cause for further proceedings accordingly.

Decree reversed, with costs to appellant, and cause remanded.

FOR REFERENCES TO VARIOUS PROPOSITIONS OF PRINCIPAL CASE, see *Maryland Fire Ins. Co. v. Dalrymple*, 89 Am. Dec. 779, and note thereto.

EQUITY WILL INTERFERE TO PREVENT MULTIPLICITY OF SUITS: *Holland v. Mayor etc. of Baltimore*, 69 Am. Dec. 195; *Fann v. Hargett*, 32 Id. 689.

TINGES v. MOALE.

[35 MARYLAND, 480.]

WHERE CAUSE IS SUBMITTED TO COURT WITHOUT AID OF JURY, NO APPEAL LIES, or will be entertained for the purpose of having the appellate court examine the facts in evidence with a view to adjudge whether the finding of the court below as to them was correct.

ON APPEAL FROM CAUSE SUBMITTED TO COURT WITHOUT AID OF JURY, facts as found by court below may be considered to the same extent that they could be if they had been found by the jury, but no further.

IF QUESTION OF LAW IS RAISED ON APPEAL FROM CAUSE SUBMITTED TO COURT WITHOUT AID OF JURY, and that appears from the record, it must be examined and decided, but in doing so the appellate court can look to the character of the facts only so far as may be necessary or proper to understand and apply the law in question.

ON APPEAL FROM JUDGMENT IN CASE SUBMITTED TO COURT UPON LAW AND FACT, WITHOUT AID OF JURY, the court of appeals will review the decision upon questions of law, if the record plainly discloses the points or questions raised and decided by the court below.

OPINION OF COURT IS NO PART OF RECORD, and without some bill of exceptions, or other aid, it is not a subject-matter for review.

REAL ESTATE BROKER CANNOT RECOVER IN ACTION AGAINST VENDOR FOR COMMISSIONS where he reports an offer for property to his principal, without stating who makes it, and the same property is afterwards sold through another broker, to whom a commission is paid, for the same price, and to the same purchaser, unless it appears in evidence that the seller knew who the purchaser was, and of the sale to him, or that notice of these facts was given him by the plaintiff before the completion of the contract with and payment of commissions to the second broker.

ACTION by the appellant against the appellee to recover compensation for alleged services as a broker, rendered the latter in effecting a sale of a house. The declaration contained two counts,—one a general count for work done, the other a special count for the usual broker's commissions for procuring

a purchaser for the defendant's house at a price which the defendant accepted. The case was submitted to the court for determination without the intervention of a jury. Other facts are stated in the opinion. Judgment for defendant, and plaintiff appealed.

Arthur George Brown and F. W. Brune, for the appellant.

Benjamin F. Horwitz, for the appellee.

By Court, WEISEL, J. The appellant was plaintiff below. He sued the appellee at law for services, in the shape of commissions, as a real-estate broker. A case was docketed by consent, and upon appearance and issues of fact was, with the consent of the parties, submitted to the determination of the court, and judgment was rendered for the defendant.

With a view to bring the cause to this court on appeal, the proof was embodied in a bill of exceptions, concluding with a motion by the plaintiff's counsel to the court "to decide that the plaintiff was entitled to recover, inasmuch as it appeared from the evidence that the plaintiff was employed by the defendant to procure a purchaser for his dwelling-house, and in the course of this employment he called the attention of Mr. Reinecker (the purchaser) to the house, showed him the property, and secured an offer from him, which the defendant subsequently took, and that the negotiation between the plaintiff and the said purchaser was the foundation on which the sale made by the purchaser rested." The court refused so to decide, but proceeded, in the form of an opinion, to state the facts as shown by the proof, and to apply to them certain principles of law and adjudicated cases, upon the consideration of which judgment was pronounced for the defendant. To the refusal to decide agreeably to the plaintiff's motion, and to the judgment as given, the exception was taken by the plaintiff. The opinion of the court, incorporated in the bill of exceptions, thus becomes a part of the record before us, and it sets forth the facts as either found by the court or proved upon the trial, with its view of the law as applicable thereto.

The appellee filed a motion to dismiss this appeal, which was heard in connection with the argument on the points presented by the briefs. The motion to dismiss took the ground that inasmuch as this cause was heard and decided below since the constitution of 1864 went into operation, and that by the sixth section of article 4 of said constitution the

parties to any cause might submit the same to the court for determination without the aid of a jury, the jurisdiction of the court in such cases was limited and restricted, and as no appeal was specially given, none therefore lay. It was also contended, in support of the motion, that the record does not disclose what question of law was raised or made in and decided by the court below; and that therefore this court has nothing before it for its review: See 1 Code, art. 5, sec. 12.

The provision of the constitution authorizing the parties to a suit at law to submit facts to the trial and determination of the court without the aid of a jury cannot be regarded as restricting the jurisdiction of the court, or as conferring upon it a special jurisdiction. There is no superadded jurisdiction of a limited or restricted character to the general jurisdiction of the court, but a mere authorized change, in certain cases optional with the parties, in the mode of trying facts, already a part of its general jurisdiction. But this change does not enlarge the subject-matter of appeals. With the facts as found by the court below upon such a submission, this court has no more to do upon appeal than if they had been found by the jury. It is only upon the law arising upon facts, as admitted by the pleadings, or agreed by the parties, or found or to be found by the jury (or by the court when substituted for the jury), and raised in the modes adopted in our practice, that this court has to deal in appeals from judgments of courts of law; and when such questions appear by the record to have been raised and decided below, the right of appeal is undoubted, and is secured by the general language of the third section of article 5 of the Code of General Laws.

In this case we cannot examine the facts in evidence in the bill of exceptions with a view to adjudge whether the finding by the court was or was not correct. As to that branch of the case, no appeal lies, and we entertain none. If a question of law has been raised upon them below for decision, and that appears from the record, it is our duty to examine and pronounce upon it. We can look to the character of the facts in proof only so far as may be necessary or proper to understand and apply the law in question.

In this case, had a jury been impaneled, and an instruction prayed in the language of the motion that was addressed to the court, it would have been rightly rejected as not covering the whole case.

The court was asked, in the form of a motion, to adopt what

was stated in it as the law of the case, and to decide it accordingly. But the whole matter being before the court, first to ascertain from the proof the facts, and then to apply the law to the state of facts as found, it was the duty of the court to disregard and reject the proposition of law as presented in the motion if deemed erroneous, and to decide the case in conformity with the views which it would otherwise entertain. The opinion of the court succinctly states the principle which governed it in the decision, viz.: "If a broker who first procures a purchaser reports his offers to his principal without identifying the person from whom they come, he cannot recover commissions in case of a subsequent sale through another broker at the same price to the same purchaser, unless it appears in evidence that the seller knew this fact, or that notice was given him by the plaintiff before the completion of the contract and payment of commissions to the second broker." We are of opinion that this was a correct exposition of the law in such a case, and that the judgment of the court should be affirmed. If there be but one broker employed, he can with safety withhold the name of the purchaser until the sale shall have been made. But as the employment of one broker does not preclude the employment of another to procure a purchaser for the same property, it becomes, therefore, the duty of the broker who procures one, and who looks to the security of his commissions, to report the name and offer to his principal, that the latter may be notified in time, and thus put upon his guard before he pays the commissions to either.

Before leaving this case, it may be proper to observe that in cases like this, of submission to the court without the aid of a jury, more care or precision should be adopted in raising the questions of law for the decision of the court below, that upon appeal parties may not lose the benefit of appeal, or this court be left to gather them from the opinion of the court below, or the course of the trial there.

Judgment affirmed.

GENERAL RULE AS TO COMMISSIONS, AND EFFECT OF BROKER BEING PREVENTED BY HIS EMPLOYER FROM COMPLETING BUSINESS: *Gottschalk v. Jennings*, 45 Am. Dec. 70.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: It is well settled by the authorities generally, and in Maryland, that a broker is entitled to his commissions if the sale effected can be referred to his instrumentality. It is also the established law that after

negotiations begun through a broker's intervention have virtually culminated in a sale, the agent cannot be discharged, so as to deprive him of his commissions. If the agent is the "procuring cause" of the sale made, he will be awarded his commissions: *Lively v. Miller*, 61 Md. 343. In this case there were, as in the principal case, confessedly two brokers intrusted with the sale of the property; neither had exclusive authority, and each negotiated with the same person, who ultimately bought; but it was held that if the negotiations which the first broker set on foot were completely broken off by disagreement as to the price, and the property was afterwards sold to the same party by the second broker, and on the same terms as originally offered, except a modification of a hundred dollars more per annum for the lease taken by the owner from the purchaser, the first broker was not entitled to his commissions. Where a case has, by consent of parties, been submitted to the court, and tried without the intervention of a jury, and a bill of exceptions has been taken before judgment entered, the appellate court will not, on appeal, examine the facts in evidence, with a view to adjudge whether the finding of the court below as to them was correct; and in this respect, no appeal lies or will be entertained; but if a question of law is raised, and that appears from the record, it must be examined and decided, and in doing so, the appellate court can look to the character of the facts only so far as may be necessary or proper to understand and apply the law in question: *Thomas v. Hunter*, 29 Md. 411; *Cross v. Kent*, 32 Id. 584; *Hooper v. President etc. of Baltimore etc. Turnpike Road*, 34 Id. 529, 530; *Trustees etc. of M. E. Church etc. v. Browne*, 39 Id. 161; *Taylor v. Twrley*, 33 Id. 501. It is not the province of the appellate court, in such cases of submission to the court without the aid of a jury, to determine whether the court below has correctly found the facts, but whether the law has been applied to the facts: *Taylor v. Twrley*, *supra*. And the facts as found by the court may be considered on appeal to the same extent that they could be if they had been found by the jury, but no further: *Cross v. Kent*, 32 Id. 584. When the finding in the court below is special, the review may also extend to the determination of the question whether the facts found are sufficient to support the judgment: *Trustees etc. of M. E. Church v. Browne*, 39 Id. 161. But the opinion of the court is no part of the record, and without some bill of exceptions or other aid, it is not a subject-matter for review: Id. 161, 163. In such cases of trial without aid of jury, the facts should be distinctly found and stated by the court below, in order that the questions of law arising thereon may be disposed of by the appellate court: *Taylor v. Twrley*, 33 Id. 501; *Trustees etc. of M. E. Church v. Browne*, 39 Id. 161. And the record should plainly disclose the points or questions of law raised and decided by the court below: *Hooper v. President etc. of Baltimore etc. Turnpike Road*, 34 Id. 529.

HAMMOND v. HAINES.

[35 MARYLAND, 541.]

CONSTITUTIONALITY OF MARYLAND ACT OF 1864, CHAPTER 348, RELATING TO ISSUING OF LICENSES TO SELL SPIRITUOUS LIQUORS. — This act gave to the qualified voters of the borough of North East, in Cecil County, the privilege of deciding by ballot whether any license to sell spirituous and fermented liquors, etc., should be granted, etc., to sell the same within the limits of the borough; and in case they should decide adversely

to the issuing of the license, made it unlawful for the clerk of the circuit court to issue the same. This act, on *mandamus*, was held constitutional because the borough of North East, being an incorporated borough or municipality, with the usual power to pass by-laws and ordinances for its police regulations, it was competent for the legislature to confer upon it the power to prohibit the sale of ardent spirits within its limits, notwithstanding the general license law of the state. In such a case the local law would prevail.

SAME. — ACT IN QUESTION WAS HELD NOT TO BE THAT KIND OF LAW which contains an express provision for referring it to a vote of the people for their acceptance before it can become a law. This law as it passed the legislature was complete in itself, and required no other sanction.

PETITION for a *mandamus* by the appellant, Hammond, to compel the appellee, the clerk of the circuit court, to issue to him a license to sell spirituous liquors in the borough of North East, in Cecil County. This was an appeal from an order of the court overruling a motion of the petitioner to quash the return and for a peremptory *mandamus*, and declaring the return of the respondent sufficient, and also discharging the rule to show cause, and dismissing the petition, with costs to be paid by the petitioner.

Alexander Evans and Albert Constable, for the appellant.

W. J. Jones, for the appellee.

By Court, WEISEL, J. Vincent Hammond, the appellant, applied on the twenty-first day of July, 1864, to the circuit court for Cecil County for a *mandamus* to compel the clerk of that court, the appellee, to issue to him a license to keep an ordinary in the borough of North East, in that county. The court passed an order on the appellee to show cause by a day named why the writ should not issue. The cause shown was, that the general assembly of Maryland, on the tenth day of March, 1864, passed an act (chapter 348) entitled "An act to regulate the issuing of licenses for the sale of spirituous or fermented liquors within the borough of North East, in Cecil County," which law is set out; that after the day for its going into effect, viz., on the eleventh day of April, 1864, at an election called by the commissioners of the borough of North East for the purpose of deciding by ballot whether a license to sell spirituous or fermented liquors of any kind whatsoever should be granted or issued, by the clerk of the circuit court of Cecil County, to any person to vend or sell the same within the limits of said borough, it appeared, by sixty-one ballots to fifteen, that the election was unfavorable to the issuing of said

licenses; and that a certificate of said election, signed by the judges and attested by the clerk of said election, was duly made to the respondent as clerk of said court, and filed in his office. Wherefore he alleged it was not lawful for him to issue the license to the appellant, and that he properly refused and continued to refuse to issue the same, etc. The appellant thereupon moved the court to quash the return of the respondent, and for a peremptory *mandamus*. The court overruled the motion, declared the return sufficient cause why the *mandamus* should not issue, discharged the rule, and dismissed the petition. From this order this appeal was taken.

The act of assembly set out in the appellee's return provides, first, that the qualified voters residing in the borough of North East, in Cecil County, shall have the privilege of deciding by ballot, at an election called by the commissioners of said borough for the purpose on some day in April, 1864, and on some day in the same month in each subsequent year, whether any license to sell spirituous or fermented liquors of any kind or description whatsoever shall be granted or issued by the clerk of the circuit court of Cecil County to any person to vend or sell the same within the limits of said borough; secondly, that should a majority of the votes cast at an election held as provided above be unfavorable to the issuing of said license, it shall not be lawful for the said clerk of the circuit court to issue any license for the sale of spirituous or fermented liquors of any kind within the limits of said borough for one year from the first day of May ensuing said decision in each and every year in which such decision shall be made. The act to take effect from the date of its passage.

The object of this appeal is to obtain from this court an opinion and decision upon the constitutionality of this law, in order that those whose interests are affected by it may know whether it is of binding force in regulating their conduct and business. No other purpose could be effected now upon this application for the *mandamus*, the time in which a favorable determination could have availed the petitioner having long since passed, the appeal itself having been taken as late as the 3d of July, 1865, more than six months after the order appealed from had been passed. Notwithstanding this, we have considered the question of the constitutional validity of the law, and we proceed to state briefly our conclusion upon it.

It does not belong to that class of laws which contain an

express provision for referring it to the vote of the people for their acceptance before it can become a law. The law as it passed the legislature is complete in itself, requiring no other sanction. We are not, therefore, to pass upon a law which submits to the people in the largest, broadest sense the passage of the law, or requires from them legislative action upon it before it can have the force of law.

The objection to the law under consideration is, that it provides for the suspension or repeal periodically of an existing state law by a portion of the people within a prescribed limit by means of the ballot at an election called for the purpose. It is not to be overlooked that the town of North East is an incorporated borough, a municipality with the usual powers to pass by-laws and ordinances for the police regulations of the place, and it will not be questioned that it was competent for the legislature to confer upon it the power to prohibit the sale of ardent spirits within its limits, notwithstanding the general license law of the state. In such case the local law would prevail: 1 Code, art. 1, sec. 11. The authority in this case is given to the qualified voters of the borough at an election called for the purpose by the commissioners of the borough to declare annually by ballot whether any license to sell spirituous or fermented liquors within its limits shall be granted by the clerk of the circuit court for the county. If not, the clerk, on being so certified, is not to issue any license for the purpose.

This species of legislation has undergone examination and decision in several of the states of this Union, and has called forth some of the ablest expositions of the character and nature of our representative systems of government, and of the legislative power and action of the state, to be found in any of our judicial reports. In Delaware, Pennsylvania, and Iowa it has been pronounced unconstitutional: *Rice v. Foster*, 4 Harr. (Del.) 479; *Parker v. Commonwealth*, 6 Pa. St. 507; *Geobrick v. State*, 5 Iowa, 491. On the other hand, there are decisions of a contrary character, recognizing the validity of such laws. In Pennsylvania, a distinction was recognized between the law passed upon in 6 Pa. St., referred to, and a law which authorized the qualified voters of two townships to decide by ballot on the erection of a new township taken from one of them. This law the supreme court of Pennsylvania held to be valid, the same judge who pronounced the opinion in *Parker v. Commonwealth*, *supra*, delivering the judgment of the

court in this, and asserting that it was not within the principle settled in the former case. That settled nothing more than that the general assembly could not delegate to the people a power to enact laws by the exercise of the ballot affecting the property and binding the political and social rights of the citizens, but that the erection of a township or the creation of a new district for merely municipal purposes, or convenience in the transaction of the public business, was in no degree similar to the exercise of the law-making power. He assimilated it to the cases of laying out public roads or erecting bridges, which had long been conferred upon subordinate tribunals without question as to the power of the legislature to do so; and if the courts could be invested with such power, the people could also primarily be authorized to exercise it: See *Commonwealth v. Quarter Sessions*, 8 Pa. St. 395. This decision has been criticised as in conflict with that in *Parker v. Commonwealth*, 6 Id. 507; whether justly or not, it is unnecessary for us now to examine.

In New Hampshire, similar legislation has been sustained as constitutional: *State v. Noyes*, 30 N. H. 279; though the law in that case was subject to adoption by the people of the counties, and in this respect was similar to the primary-school law of Maryland of 1825, c. 162, and of Pennsylvania of 1836. The distinction which pertains to this species of legislation seems to be well drawn in the case of *Parker v. Commonwealth*, *supra*. It might be still further illustrated by a class of laws not uncommon, and of unquestioned validity, viz., general laws of incorporation, under which parties accepting their terms, or availing themselves of their provisions, may be incorporated without special acts of incorporation.

The cases of *Burgess v. Pue*, 2 Gill, 11, S. C., 2 Id. 254, were strongly relied upon by the appellee in the argument of this case as settling the question in this state, and establishing the validity of this law. Those cases arose under the operation of the primary-school law above referred to (1825, c. 162), and the provisions of the twenty-ninth and thirtieth sections of that law for submitting it to the votes of the people of the several counties, with a view to its adoption and operation in such as would vote accordingly, were urged in the argument as not warranted by the constitution, and as avoiding the law. This court, however, held the law to be constitutional, but not distinctly upon the ground that there was no force in the objection taken to those sections, but that it was competent for the

legislature to delegate the power of taxation to the taxable inhabitants for the purpose of raising a fund for the support of the schools: *Burgess v. Pue*, 2 Gill, 11, 281, 285.

We are not, however, without an express adjudication by this court upon a law substantially similar to the one now under consideration, but which, not being reported, was not cited in the argument of this cause. The general assembly of Maryland, at its session of 1846, c. 172, passed an act declaring that from and after its passage it should not be lawful for the clerk of Washington County court to issue a license to any person or persons to sell ardent spirits within two miles of the College of St. James in Washington County without an order in writing from one of the judges of said court, who was thereby authorized to grant such order if he should be satisfied from the representations of respectable citizens in the neighborhood of said college of the necessity and propriety of granting such license.

This law, it is true, contains a section repealing all laws or parts of laws inconsistent with it, but it still left the license law operative within the interdicted limits, provided one of the judges of the county court, being satisfied of its propriety and necessity by the representations of respectable citizens in the neighborhood of the college, should give an order to the clerk to issue the license. In this case, the representations of respectable citizens of the neighborhood, and an order of the judge thereon, was declared effective to put the law in operation in a prescribed district. In the town of North East, a majority of its qualified voters, speaking through the ballot-box, was declared to have the effect of suspending the operation of the law within its limits. The effect was, or is, the same in both, one operating affirmatively, the other negatively; the mode of expressing the assent or dissent only being different. We regard both laws as virtually involving the same principle, and alike obnoxious to the constitutional objection.

A man named Lancaster, living within two miles of the College of St. James, was indicted for selling liquor at his residence, and convicted and fined. His defense was, that he had tendered the price of a license to the clerk of Washington County court, who refused to grant it without the order of a judge, as required by the law. Lancaster appealed to the court of appeals, and in this court, by agreement of counsel, the question of the constitutionality of the law of 1846, c.

172, was submitted to the court and argued as the only one for its determination. The court was unanimous in the opinion that the law was constitutional, and so adjudged: *Lancaster v. State*, decided at December term, 1850 [not reported], referred to in *Rawlings v. State*, 1 Md. 128.

We think this case decides the law for the town of North East under consideration in this appeal, and that the order of the court below discharging the rule and dismissing the petition for a *mandamus* was correct and should be affirmed.

In deciding this law to be constitutional, this court is not to be understood as embracing within its views the character of a law which would, in a broader or more enlarged sense, submit its passage or existence to the popular vote. "Law (as has been most aptly defined) is the result of the legitimate action of legislative power." The constitution wisely distributes the powers of government among several and distinct departments, and the limits of these cannot be extended, or an encroachment of one upon the other permitted, without a violation of the social compact and a derangement of the social order. The general assembly, composed of the senate and house of delegates, is in this state the only law-making power. The popular will is not to be disregarded, but that, always in theory and generally in practice, is reflected by the representatives of the people in the legislative department of the government. With them is lodged the power of making laws for the government of the people, and the due responsibility of the representative to his constituents is best maintained, and stable and wholesome legislation secured, by avoiding judicial refinements by which this power is extended to any whom the constitution has not invested with legislative action.

Order affirmed.

CONSTITUTIONALITY OF LIQUOR LAW SUBMITTED TO VOTE OF PEOPLE: *Santo v. State*, 63 Am. Dec. 487, and note 518, containing cases showing the constitutionality of acts submitting to a vote of the people whether they shall take effect or not. See also extended note to *Commonwealth v. Kimball*, 35 Id. 331-339, on intoxicating liquors, sale of, and how far the state may regulate or prohibit.

THE PRINCIPAL CASE WAS CITED in *Fell v. State*, 42 Md. 88, where it was held that the local-option law, act of 1874, chapter 453, was constitutional and valid; and that its going into effect and becoming operative, where such operation was made to depend upon the contingency of a popular vote, was not a delegation of legislative power to the people. Act of 1882, chapter 92, known as the local-option law for Harford County, the operation of which

was made to depend upon the contingency of a popular vote, was held to have become a valid law as soon as it received the governor's approval in constitutional form, notwithstanding that its operation was deferred till a future time, and made to depend on such contingency: *Skymer v. State*, 62 Id. 240.

MARBURG v. MARBURG.

[26 MARYLAND, 8.]

IN ACTION IN ONE COUNTRY FOR DEBT MADE PAYABLE IN ANOTHER, the plaintiff is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, and to this end is entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between those countries added to or subtracted from the amount, as the case may require, in order to replace the money in the country where it ought to be paid.

WHERE FOREIGN MONEY OR DEBT DUE IN SUCH MONEY IS OBJECT OF SUIT, its value should be computed according to the rate of exchange at the time of trial or judgment.

DEBT MERGES IN JUDGMENT RECOVERED UPON IT, in Maryland, and its specific character as a foreign debt is thereby lost; the judgment presumptively ascertains the liability of the debtor according to the law of the contract, and by its recovery the debt becomes a domestic debt of record, in all respects subject to the law of the forum.

BY EXPRESS PROVISION OF STATUTE IN MARYLAND, COURT OF APPEALS has no power to reverse a judgment upon the ground that it is entered for a larger sum than is claimed in the declaration.

ACTION to recover the value of goods sold and delivered.
The opinion states the facts.

Thomas S. Alexander, for the appellant.

I. Nevett Steele, for the appellee.

By Court, COCHRAN, J. This suit was brought by the appellee to recover a balance due for goods sold to the appellant at Frankfort on the Main. The debt, stated in the bill of particulars to be 26,317.44 florins, is admitted, and it appears that this sum, by an agreement between the parties, was to be paid to the appellee in florins at Frankfort, the place of his residence.

All the important questions presented by the exceptions relate to the rule for ascertaining the amount recoverable in the money or currency of this country in satisfaction of the debt payable at Frankfort; and for the purpose of disposing of them as a whole, without regard to their order, we propose to consider and determine the general character and operation of the

rule for ascertaining the extent of the creditor's remedy in that class of cases.

This subject has been discussed in America as well as in the English courts, and the same doctrines, as we think, have been finally settled in both. In *Cash v. Kennion*, 11 Ves. 314, where a debt contracted in Jamaica was made payable in London, Lord Eldon held that the debtor was bound to pay the expense of remitting the money; "that if a debtor agrees to pay one hundred pounds in London on a given day, he ought to have that sum there on that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been executed."

This rule was adopted in *Delegal v. Naylor*, 7 Bing. 460, 20 Eng. Com. L. 208, and also in *Scott v. Bevan*, 2 Barn. & Adol. 80, 22 Eng. Com. L. 42. The best considered of the American cases are in strict accordance with these authorities. Story, J., in *Grant v. Healey*, 3 Sum. 523, said "that whenever a debt made payable in one country is sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, with interest for the delay, for then, and then only, is he fully indemnified for the violation of the contract. In every such case the plaintiff is therefore entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between those countries added to or subtracted from the amount, as the case may require, in order to replace the money in the country where it ought to be paid." This doctrine he propounds as one founded on principles of reciprocal justice. In the case of *Lee v. Wilcocks*, 5 Serg. & R. 48, the court declares the settled rule to be, "where foreign money is the object of the suit, to fix the value according to the rate of exchange at the time of trial"; and the same rule was applied in *Smith v. Shaw*, 2 Wash. C. C. 167.

The New York and Massachusetts cases, referred to by the appellant in support of a computation based upon the par of exchange, were reviewed in *Grant v. Healey*, 3 Sum. 523, and were rejected as authorities on that point. The best considered cases bearing on this question are collated in 3 Kent's Com. 317, note, and in 2 Parsons on Notes and Bills, 370, and the rule deduced from them is, that a creditor suing here for an amount payable to him in a foreign country, in the cur-

rency of that country, is entitled to recover an amount sufficient to produce the sum of the debt where it was made payable; or in other words, an amount equal to what he must pay to remit the debt to the place where it was payable. It will also be seen from the authorities referred to that the amount recoverable should be computed according to the rate of exchange at the time of the trial or judgment. This principle in both particulars must, in our opinion, be applied to the present case, and we hold accordingly that the appellant was entitled to a judgment for an amount which, at the time of trial, would have enabled him to realize the amount of his debt in florins at Frankfort.

Assuming this standard or measure of his claim in the money or currency of this country to be the true one, we do not find that it is in any way affected by the first section of article 32 of the code, recognizing the coinage of the United States as the currency of this state, or by the third section of the same article, requiring all judgments to be entered in dollars and cents. The appellant was entitled to a judgment for an amount that would pay his debt at Frankfort, and in that particular the judgment recovered appears to have been entered in conformity with the requirements of the code. Both of these provisions were taken from the act of 1812, c. 135, and the court was not at liberty to disregard them and enter the judgment for money in other denominations than those prescribed.

The suggestion of the appellant that this is a foreign debt, and that the judgment recovered upon it shall partake of the original character of the debt and be payable only in gold or silver coin, is not consistent with the facts in the case, nor with the principles upon which we have said the judgment was recoverable. It proceeds on the theory that the recovery here of a judgment on a foreign debt, as distinguished from a debt originated and made payable in this country, does not bring the debt so recovered within the legal operation and effect of the acts of Congress authorizing the issue of notes of the United States as lawful money, and making them a legal tender for all debts within the United States, except for duties on imports and interest on the public debt. According to the ordinary rules of legal reasoning, the specific character of a foreign debt, as such, is lost by the recovery of a judgment upon it here. In such a case, the debt merges in the judgment, which presumptively ascertains the liability of the

debtor according to the law of the contract, and by the recovery of the judgment it becomes a domestic debt of record, in all respects subject to the law of the forum.

The consistency of these congressional acts with the constitution of the United States was conceded by the counsel of the respective parties, and assuming them to be free from objections on that ground, as under the circumstances we are required to do, it follows that the appellant was at liberty to satisfy any judgment obtained against himself by payment made in the currency authorized by those acts. Treating the judgment, therefore, as one that the appellee could not compel the appellant to pay in coin, and as one that the appellant could satisfy in currency, it is evident, in view of the principles upon which we have said that the judgment was recoverable, that it should have been entered for an amount which, subject to the appellant's privilege of paying in currency, would then have been sufficient to enable the appellee to realize his debt in florins at Frankfort. By no other method known to our practice could the full recoverable amount of his claim have been ascertained and adjudged to him; he was therefore at liberty to show by competent evidence the ruling rate at which exchange in the paper currency of the United States could then be effected. The suggestion that the judgment is erroneous because it is entered for a larger amount than was claimed in the declaration cannot affect the disposition of the case on this appeal. Under section 39, article 29, of the code, this court has no power to reverse a judgment upon that ground. It is there expressly declared that "no judgment shall be reversed in the court of appeals because the verdict was rendered for a larger sum than the amount laid in the declaration."

It will be seen from this expression of our views on the whole case that none of the exceptions taken by the appellant to the rulings of the court below can be sustained.

Judgment affirmed.

THE PRINCIPAL CASE IS CITED to the point that in an action in one country for a debt made payable in another the plaintiff is entitled to receive the full sum necessary to replace the money in the country where and at the time where it ought to have been paid: *Copron v. Adams*, 28 Md. 545.

BARNUM v. BARNUM.

[26 MARYLAND, 119.]

ESTATE SO LIMITED THAT IT MAY BY POSSIBILITY EXTEND BEYOND LIFE OR LIVES IN BEING at the time of its commencement, and twenty-one years and a fraction of a year (to cover the period of gestation) afterwards, during which time the property would be withdrawn from the market or the power over the fee suspended, is a perpetuity, and void as against the policy of the law, which will not permit property to be inalienable for a longer period.

DEVISE IN TRUST IS VOID UNDER RULE AGAINST PERPETUITIES, where the testator, after empowering and directing trustees named to lease his hotel property and apply the rents, provides that "the period during which my trustees, and their heirs and successors, shall have the power and are required to lease as aforesaid shall be so long as my said children, or any children or descendants of them, or any of them, left by them, or any of them, at the death of them, or any of them, shall live; it being understood that any lease made during the period aforesaid shall have full effect, and continue for its stipulated term, notwithstanding the cessation of all of said lives before the end of the term"; for under these provisions the period for continuing the trust or power to lease may extend so as to embrace persons and lives not *in esse* at the time of the testator's death.

WHERE TRUST IS VOID UNDER RULE AGAINST PERPETUITIES, a power to lease which is not a mere power distinct from the trust, leaving the act to be done at the will of the party to whom it is given, but is mixed and blended with the trust, and is as imperative in its execution as the trust itself, is also void.

EVERY POWER, DIRECT OBJECT OF WHICH IS TO CREATE PERPETUITY, is generally held to be absolutely void; the exceptions to the rule arise out of the distinction between general and limited or special powers.

EXECUTION OF POWER, BEING DISTINCT FROM POWER ITSELF, must conform to the requirements of the rule against perpetuities, or run the hazard of being avoided.

WHERE POWER DOES NOT IN ITSELF TRANSGRESS RULE AGAINST PERPETUITIES, the appointee may, in executing it, go beyond the boundary provided by such rule; and equity in such case being guided by the power, will treat the excess as surplusage and void, but only where the excess be definite and ascertained, or can be rendered so. If, however, the limitation is in the instrument itself which creates the trust or power, and no one can declare with certainty how the dispositions of the testator would have been regulated if he had been aware at the time of his inability to extend them to some included in his gifts, the whole will be vitiated by the excess.

IF TRUSTS ARE ABSOLUTELY VOID UNDER RULE AGAINST PERPETUITIES, legacies springing out of them must also be regarded as void.

IF POWER TO LEASE INCLUDED IN TRUST IS VOID, because of invalidity of the trust under the rule against perpetuities, the right to share in the distribution of the rents given by the instrument creating the trust will necessarily fail.

WHERE TESTATOR, AFTER HAVING DEVISED IN TRUST, PROVIDES as follows: "Should my views in the above first article of this will be disappointed,

so that judicially or otherwise a sale should take place of said City Hotel buildings and grounds during the life of my children, it is my will and I direct that my trustees, or any court of equity, shall cause the proceeds of sale to be invested in mortgage or ground-rents, or in debt of the United States or of the city of Baltimore; and that subject to the payment of one third of the income of the investment to my wife during her life, the said investment shall be for the benefit of my children during their lives, and after their deaths shall be the property, for the shares of the decedents, of their respective children or descendants, *per stirpes*; the children or descendants of such of my children as shall have died before the investment, taking as their absolute property, and *per stirpes*, the shares to which, if they had lived, the deceased would have been entitled," — *held*, that as equity treats as done that which ought to be done, if upon the failure of the first article, parties became entitled to the proceeds of sale when effected, they would have a right to resort to a court of equity for a sale which would produce those proceeds; and that in substance the will is the same as if it directed a sale to take place in case the views in the first article could not be carried out.

BILL in equity to obtain construction of will. The opinion states the facts.

E. O. Hinkley and Thomas S. Alexander, for the appellants.

I. Nevett Steele and William Schley, for the appellees.

By Court, WEISEL, J. The controversy in this case arises upon the construction of the will of the late David Barnum of Baltimore, the founder and proprietor of the City Hotel of that city. It was executed on the 29th of August, 1843, with a codicil made on the second day of September following. They were admitted to probate on the thirteenth day of May, 1844.

After a careful examination of these papers, as spread out in the record, we can present the following as an analysis of them, by which their provisions will be the more clearly understood, and the intention of the testator more readily ascertained. The will and codicil alone furnish the facts in the statements which this analysis contains.

The principal part of his estate was the City Hotel buildings and grounds in the city of Baltimore, and the furniture and chattels in that hotel. To this part of his estate his entire will and codicil relate, with the exception of clause fourth (save its concluding sentence), and clauses fifth, sixth, and seventh. The eleventh appoints executors, but they have duties to perform in certain events in relation to this property. The controversy is about this portion of his estate.

He had a family. A wife and children named in the will, among whom, and their representatives in case of their deaths,

the net rents of the hotel were to be distributed, composed, as we may fairly conclude, the family he had in contemplation when he used the term.

He had debts to provide for as therein declared. These were of two classes, a City Hotel stock debt, and his general debts.

He undertook to make a disposition of this City Hotel property and furniture in a way which, in his judgment, would prove a sure and better resource for his family. In doing so, he did not forget or overlook his duty to his creditors of both classes; but whilst providing for his family from the rents and profits of the property, he primarily charged these with the payment of the regularly accruing interest upon the City Hotel stock, and of his general debts. He introduced this plan by an expression of a desire at the beginning of the first clause of the will that his City Hotel property in Baltimore should be permanently conducted after his death as a hotel, and of his belief that the property thus employed would prove a sure and better resource for his family.

The plan is set out in the first, second, third, eighth, ninth, and tenth clauses, and the last paragraph or sentence of the fourth clause of the will, and the entire codicil. These should be read together. The second clause refers to the first clause alone as containing his views or plan; but it is very manifest that the other clauses here specified and the codicil would share the fate of the first by the application of the second clause, whenever declared operative to disappoint those views.

Disregarding, then, at present, the second clause, and reading the other clauses above designated, and relating to this property, together, we discover his disposition of it to be this: He devised all his said hotel property, real and personal, to two trustees, his wife and his son, Ephraim K. Barnum, and the survivor and the survivor's heirs. By clause tenth the continuance of the trust is provided for in case of the death of both of said trustees. The property thus devised is described as "all the buildings of said City Hotel, and all the grounds thereof, and all the furniture, and all other chattels of said hotel, now or hereafter attached to it or used for it." The trusts are declared. The trustees were to lease the said property, and apply the rents in a specified mode. With this view he divided the buildings, etc., into what he devoted to hotel purposes, and what he designed for other uses, calling or distinguishing the former as the hotel part of the property. The

hotel part was not to "include any of the offices or apartments of the basement story of the City Hotel buildings, save only what was used for the lower bar and lunch-room of the hotel, and the apartments used for the culinary and other purposes of the hotel buildings." All else, including furniture and chattels, are denominated in the will as "the hotel part of said buildings and grounds, furniture and chattels."

This hotel part the trustees were to permit Zenus Barnum and Andrew McLaughlin (or one of them if both would not agree to be tenants) to use, occupy, and enjoy as tenants, upon condition that they would conduct it as a hotel, and for the term of three years, at the yearly rent of ten thousand dollars, payable quarterly; and if they, or either of them, declined to rent it, or taking it their tenancy should by any means be terminated, the trustees should, from time to time during the period hereafter mentioned, lease the said hotel part for terms of years not exceeding ten years, for such yearly rent as his executors or administrators with the will annexed should approve, to any person who they should be satisfied would well conduct it as a hotel; the rents under all the leaseings to be primarily chargeable, in exoneration of all his other estate, real and personal, with the interest on the City Hotel stock and his general debts.

After deduction for the interest on the hotel stock and his debts, the trustees were directed to apply annually the rents of the said hotel part as follows: Three hundred dollars annually to his widow, in quarterly payments, in consideration of her ownership of a piece of ground constituting a part of the hotel premises (with power in her to take possession of it and use or sell it in case of default in any payment); and of the residue, one third to his wife for life, and the other two thirds "in equal shares to and among his children and their respective heirs (*per stirpes*), Eliza Stannard, Frances McLaughlin, Ephraim Kirby Barnum, Richard Barnum, and Augustus Barnum"; these children and their respective heirs in like manner being entitled at his wife's death to her one third of the said rents.

The rents of the offices and rooms in the basement, not included in the hotel part, he devised as follows: Of room No. 4, to his daughter Frances McLaughlin and her heirs; of room No. 5, to his daughter Eliza Stannard and her heirs; of room No. 6, to his son Richard Barnum and his heirs; of room No. 10, to his granddaughter Frances Waterman and her heirs; of

room No. 9, to his grandson David McLaughlin and his heirs; of room No. 11, to his son Augustus Barnum and his heirs; of rooms Nos. 7 and 8, to Ephraim K. Barnum and his heirs (in case the testator should sell the coal land devised to him in the sixth clause of the will); and of office No. 3, to Zenus Barnum for his life.

He directed that if the devise of the rents of said rooms 7 and 8 to his son Ephraim should not take effect they should be deemed part of the general residue of his estate; and that the trustees should from time to time rent out said offices or rooms, or allow the same to be done by the respective devisees of the rents thereof.

By the eighth clause or article a discretionary power is given to his executors or administrators, *c. t. a.*, to mortgage the City Hotel buildings, furniture, and chattels on such terms as they might deem expedient to obtain money for paying his general debts, and then to set apart such portion of the rents of the hotel part of said buildings as they might deem expedient for reducing the principal of the mortgage, as well as paying the mortgage interest, either by way of actual payment to the mortgagees, or of a sinking fund to accumulate for the eventual extinction of the mortgage principal.

The proceeds of sales of his country seat on the Harford turnpike (fourth clause) are also charged with the payment of these debts in case the arrangement for the purpose in the first clause should prove impracticable, or if money could not be procured by mortgage as above. These two latter modes to be first availed of if practicable. The tenants were to be bound to keep the furniture and chattels in good condition as delivered to them, and to replace such as should be lost or destroyed, or rendered useless by wear or tear, except by fire, against which risk the trustees were to keep the furniture and chattels insured in an amount deemed prudent, as also the said City Hotel buildings.

The period during which this leasing was to take place, and this trust to continue, was to be "so long as his said children, or any children or descendants of them, or of any of them, left by them, or any of them, at the death of them, or any of them, shall live; it being understood that any lease made during the period aforesaid shall have full effect and continue for its stipulated term, notwithstanding the cessation of all of said lives before the end of the term."

We may observe here, though it may not be material in the

examination of the questions before us, that the various provisions made for the payment of his general debts do not interfere with the trust. That is still to subsist. If a mortgage were effected, these debts by that means would be consolidated, and bind the hotel property in the hands of the trustees, and the rents would be made applicable by them to the consolidated debt and its interest, in the mode specified in the eighth clause, instead of in the way contemplated in the first clause or article. By this clause, the executors or administrators *cum testamento annesso* were to approve of the yearly rent for which the trustees were to lease the hotel part of the property (except that for the three first years to Zenus Barnum and McLaughlin).

By the eighth article, the collateral power was conferred upon them to mortgage, if they deemed it expedient, the City Hotel buildings, furniture, and chattels to pay his said debts. They were the proper, legal parties to pay debts, and this may explain why the testator, in providing assets for the purpose, conferred upon them these powers of approval and control over the property. The hotel stock debt, it seems, was to remain in its original form as a distinct, peculiar debt, the rents applicable to the interest only on it. His intention, however, appears to be, not to extinguish his general debts by applying all the rents of the hotel part primarily to that object, for his family was to be supported at the same time. If an annual partial application proved too slow, and creditors could not wait, then a mortgage could be resorted to. If that failed, or when made were passed to a foreclosure, then the avails of his country seat on the Harford turnpike should be brought into requisition for this purpose.

This, we consider, is the purport and reading of the will in the clauses mentioned respecting the City Hotel property, real and personal, and constitutes the testator's plan or views for permanently conducting the hotel during the period described as a sure and better resource for his family, including a provision for the payment of his debts at the same time. For these the said property would have been legally bound by the testamentary and chancery laws of Maryland, a condition which its owner would not likely disregard or overlook in making a settlement for his family.

The first and very important question which arises on this statement of the contents of the will, and which has been most ably discussed at the hearing of this cause, is, whether the

period described in the will through which the leasing by the trustees is to run transgresses the rule of law against perpetuities; whether it exceeds a life or lives in being at the testator's death, and twenty-one years and the allowed fraction of a year afterwards. That period is thus described: "And the period during which my trustees and their heirs and successors shall have the power and are required to lease as aforesaid shall be so long as my said children, or any children or descendants of them, or of any of them left by them, or any of them, at the death of them, or any of them, shall live; it being understood that any lease made during the period aforesaid shall have full effect and continue for its stipulated term, notwithstanding the cessation of all of said lives before the end of the term."

It was very ingeniously pressed upon the court by the counsel for the appellees in the argument that a fair philological examination of this sentence would confine the time within the rule; and that the word "left," by assigning to it a past signification, and allowing the will to speak as of the day of the testator's death, would indicate an intention to point to his own children and children and descendants of children living at the time of his own decease; and that upon this construction the powers of the trustees would not, and were not intended to, endure beyond the lives of persons who should at the moment of the testator's death answer the description of children or descendants of children; in other words, that descendants of children born after the death of the testator were not to be embraced within the continuance of the power to lease; and that the word "left" is not of the same import in the will as if the language were, may be left by them (the children) at the period of their (the children's) deaths respectively.

But we think this clause will not admit of this interpretation. The participle "left" must have reference to and qualify the word with which it stands connected in the sentence, express or implied. And here the persons designated as "left" are the children or descendants of any of his children, and the time of being left is so plainly expressed that no doubt can well arise or be entertained, viz., at the death of any of his said children. If the testator meant otherwise, and intended to confine the time to his own death, he would not have resorted to phraseology so elaborate as that used by him when the simple phrase of "living at my death" would have at once conveyed his meaning. His own death and the death of any

of his children are two distinct events. He has used language plainly and distinctly, as we think, to express the latter. Upon what rule of construction, then, can it be applied to the former?

The time or period, therefore, for continuing this trust or power to lease the hotel property may extend so as to embrace persons and lives not *in esse* at the time of the testator's death,—descendants born after that event.

If an estate be so limited as by possibility to extend beyond a life or lives in being at the time of its commencement, and twenty-one years and a fraction of a year (to cover the period of gestation) afterwards, during which time the property would be withdrawn from the market, or the power over the fee suspended, it is a perpetuity, and void as against the policy of the law, which will not permit property to be inalienable for a longer period. The question whether an estate is a perpetuity generally arises in cases in which a future contingent estate or executory devise is limited upon a fee, and if the contingency upon which the executory estate is to vest is not necessarily to happen within the time fixed by the rule as the legal boundary, then the precedent estate or estates are denominated a perpetuity, and the executory estate or devise fails for want of a legal estate to support it. In all such cases, to give effect to the limitation over, the contingency "must" happen within the time prescribed by the rule. If it "may" happen after that time, then the preceding estate tends to a perpetuity, which the law abhors and forbids. The object of the rule is to prevent the tying up of property, real or personal, and rendering it inalienable longer than the period designated by it. For that time the power over the inheritance or absolute interest of property may be suspended, but no longer: *Lewis on Perpetuity*, 164, 165; 4 *Kent's Com.* 267, 271; *Newton v. Griffith*, 1 Har. & G. 116; *Dallam v. Dallam*, 7 Har. & J. 236.

In the case now under consideration, no question is presented as to the future vesting of an executory estate in order to determine the validity of the preceding one; but simply whether the trusts of the will require in their execution a longer period than that prescribed by the rule against perpetuities, and therefore render the property devised to the trustees inalienable during that time. If so, the law denounces the devise in trust as a perpetuity, and declares it void.

We have already said that such is the character of this devise; that the execution of the trusts for leasing the property and performing the duties enjoined upon the trustees is to cover a period beyond that allowed by law, during which time this hotel property, real and personal, is placed *extra commercium*; and that the devise in trust is therefore void.

If the trust be void, then the power to lease which is blended with it, as in this case, must be void also. It is not a mere power distinct from the trust, leaving the act to be done at the will of the party to whom it is given, but it is mixed and blended with the trust, and its execution is as imperative as the trust itself. This distinction is well marked and to be observed: 2 Sugden on Powers, 158. In this case the power is the trust, and the trust is the power. They cannot be separated, and any exceptions to the application of the rule in cases of mere powers to sell or lease do not apply to a case like this. The general principle is, that every power the direct object of which is to create a perpetuity is absolutely void: Lewis on Perpetuity, 486, and cases there cited. The exceptions to the rule, then, arise out of the distinction between general and limited or special powers. But in every case, the execution of the power, being distinct from the power itself, must conform to the requisition of the rule against perpetuities, or run the hazard of being avoided. And where a power is itself valid, in not transgressing the rule, the donee, in executing it, may go beyond the proper boundary. Equity in such case, being guided by the power, will treat the excess as surplusage and void, but only where the portion which exceeds the boundary of perpetuity be definite and ascertained, or can be rendered so. But Mr. Lewis, in his work, p. 494, adds, "that if the limitation under the power be read as inserted in the deed creating the power [which he elsewhere observes to be the true rule by which to determine the validity of the limitation itself], it is evident that where a part of the appointment fails for excess, the whole must be involved in its fate, because such failure implies that all the interests created were not so given as necessarily to vest within the perpetuity line; and wherever such is the character of direct original limitations, they are wholly void for remoteness, notwithstanding actual events might enable some, or even all of them, to take effect within the required period." In the case under consideration, the limitation is in the instrument itself creating the trust or power, and no can declare with certainty

how the dispositions of the testator would have been regulated if he had been aware at the time of his inability to extend them to some included in his gifts. The whole is therefore vitiated by the excess. This is strengthened when we consider that this trust was created as a resource for his family, and to this end for permanently conducting the property as a hotel, the testator's idea of his family being itself a matter of much controversy and doubt.

These views may sufficiently dispose of that part of the argument, on behalf of the appellees, which labored to extricate the trust in this case from the effects of the perpetuity rule, on the ground that it did not apply to powers exercised as in this case, or if so, that the trusts would be declared good in equity *pro tanto*, or to the extent of the rule.

The trusts being void *in toto*, we regard the lagacies springing out of them to be void also. The power to lease being void, the right to share in the distribution of the rents, the fruits of the exercise of the power, must necessarily fail: *Coe-ter v. Lorillard*, 14 Wend. 265 et seq. It is needless, therefore, here to inquire what estates the children of the testator took in these rents under the phraseology of the will, so much discussed in the argument as bearing upon the testator's intention in the perpetuity clause, or as rendering the estates of the *cestuis que trust* free from its obnoxious effect, regarding them as fee-simple, equitable interests, and alienable at the pleasure of those entitled.

If the clauses already referred to and analyzed with the residuary clause constituted the entire will, the devise of the trust being void, the testator would be held to have died intestate of his hotel property. It would not pass by the residuary clause, under the rulings of this court in the case of *Tongue v. Nutwell*, 13 Md. 416.

But there is another and important clause or article in Mr. Barnum's will which is yet to be considered, and under which the complainants, the appellants, claim in this case. The testator's intention in that article is to be inquired into, and effect given to it consistently with the rules of law.

Upon its construction and effect this court do not entirely agree, as they have concurred in the preceding part of this opinion. A majority of the court, however, have, after a careful examination of the second article in connection with all the other portions of the instrument, arrived at the conclusion that the testator intended by it an alternative provision in

case his views expressed in the first article should be disappointed by any cause which would lead to a sale of the City Hotel buildings or grounds in the lifetime of any of his children. The language of the article is: "Should my views in the above first article of this will be disappointed, so that judicially or otherwise a sale shall take place of said City Hotel buildings and grounds during the life of any of my children, it is my will and I direct that my trustees, or any court of equity, shall cause the proceeds of sale to be invested in mortgage or in ground-rents," etc.

It is apparent from the other parts of his will that the testator's principal object was a family settlement in regard to the main and favorite part of his estate. The various and complicated provisions of the instrument, constituting almost its entire contents, are devoted to this purpose. He devised a mode for perpetuating it, and for working out through its means a provision for the liquidation of his debts, and the support of his family through all the generations of his descendants, and providing for a correspondent continuation of the trust beyond the lives of those named as trustees in the will, by his executors and administrators *cum testamento anexo* to be appointed.

Although the third and other articles of the will stand necessarily in connection with the first, it is the first that embodies the main features of the settlement. It names the trustees, the period of the trust, the *cestuis que trust*, the trusts themselves, with other guards and provisions for their safe and continued execution. His views may therefore be said to be contained in the first article, though in fact the other articles also embrace portions of them.

It was contended by the counsel of the appellees, with plausibility and force, that this second article was not intended to go into operation unless a sale of the buildings and grounds of the hotel should judicially or otherwise take place against the testator's will, and not until and after such a sale had taken place, and as a condition precedent, and that his motive in introducing it was *in terrorem*, to prevent the destruction of the trust by any of his children, who in such event should receive only life estates in the proceeds. And as no such sale has taken place, the clause itself is and remains inoperative, and the bill of the complainants has been prematurely filed; that the contingency or event upon which another and different disposition of the property is to

take effect has not happened, and therefore no rights under it have accrued or can be asserted.

The testator might reasonably be supposed to provide some mode for securing a cherished plan, and rendering it completely operative. But if this were the motive for the insertion of the second article, why hold the rod over his children, when grandchildren, decendants of a deceased child, might effect the same interruption, — tempted, too, by the absolute possession and enjoyment of the proceeds of sale?

It is impossible to say what was the governing motive of the testator in inserting this second article. He may as reasonably, if not more so, have looked forward to a probable sale of the hotel during the life of some one of his children, five in number, even if he was not aware that he had violated the rule against perpetuities, and thereby rendered the first article void and inoperative. He owed debts for which the urgent demands of creditors might render a mortgage of the hotel expedient, a prior plan; for the proceeds of the country seat were to be postponed to this. A mortgage effected might in time be pressed to a foreclosure or sale. The stockholders might determine upon a sale of the property to pay the certificates of stock. Other events might occur to render a sale necessary, and therefore the word "otherwise" was introduced to embrace any kind of sale. But inasmuch as the testator in this article looks only to a sale of the reality, the hotel buildings and grounds, omitting all notice whatever of the personalty, the furniture and chattels (no small portion in value or amount of the property devised in trust in so large and extensive an establishment), the inference is strong, if not irresistible, that he had in contemplation a probable sale resulting from a failure of the first article by reason of its invalidity. In such an event, the personal property would be applicable to his debts without any special provision for that purpose. The establishment could no longer be conducted as a hotel upon his proposed plan, and as a support for his family; and the next best thing, looking to a sure provision for not only his children, but their children and decendants, he directs the investment of the proceeds of the sale of the buildings and grounds in mortgage, ground-rents, United States or city of Baltimore stocks, for the benefit of his children during their lives (subject to one third of the income of the investment to his wife during her life), and after their death to be the property of their respective children or

descendants *per stirpes*; the children of such of his children as shall have died before the investment taking as their absolute property and *per stirpes* the shares to which if they had lived the deceased children would have been entitled.

If the first article should prove inoperative by the rules of law, and the testator apprehended it, what more likely than to provide in his will a substitute or alternative disposition of the estate. The presumption is, that, making a will, he did not design to die intestate of any portion of his property, particularly of that which constituted his principal estate, and which he was seemingly so careful to dispose of for the benefit of his family and creditors. In doing so, he would not likely ground his bequests upon an actual precedent sale as a condition, when a state of things might arise leading to a sale, or proceedings be instituted that would result in one. In either or any of these events, his views as contained in the first article would be equally disappointed.

It is to be noted, too, that the testator speaks in the future tense, "a sale shall take place," not in the second future, "a sale shall have taken place." The meaning is the same as if he had said, "so that judicially or otherwise a sale is to take place."

If the theory of the appellæes be correct, and any of the *cestuis que trust* in the first article taking an equitable estate in fee in the premises should sell his interest (as has been done in this case), and then a sale of the hotel buildings and grounds should take place in the lifetime of some of the children for a cause other than that of the invalidity of the trust in the first article, how could the testator's directions as to the investment of the fund take place for the life of the children, and after their death absolutely to their descendants? This conflict can only be reconciled upon the ground that the children and other legatees were to take life estates in the rents under the first and third articles, and that they had no disposable ownership in the property itself. If the testator's views in the first article should then be disappointed, and a sale take place, his intentions as to the proceeds could then be carried out under the second, in which life estates are expressly given to all the children, with remainders to the grandchildren or descendants *per stirpes*.

Equity treats as done that which ought to be done. If upon the failure of the first article parties became entitled to the proceeds of sale when effected, they would have a right

to resort to a court of equity for a sale which would produce those proceeds. In substance, the will is the same as if it directed a sale to take place in case the views in the first article could not be carried out, and it would seem the testator supposed that the trustees would have the power to make the sale. What else could he have meant by the language, "I direct my trustees or any court of equity shall cause the proceeds to be invested," etc., agreeing with the previous branch of the sentence, "so that, judicially or otherwise, a sale shall take place"? A sale by the trustees would not be a judicial sale as would be one under an order or decree of a court of equity, which could only be obtained after proceedings instituted and conducted for the purpose.

But we must not be understood as saying that the trustees have the power to make the sale under this will, as the testator has failed to use language sufficient, in our judgment, to confer it.

The first clause of the will of the testator being void, and his purposes therein declared having been disappointed, the second clause becomes operative, and the complainants are entitled to relief. It therefore follows that the court below erred in dismissing the bill. The decree appealed from will therefore be reversed, and the cause remanded for further proceedings; the costs in this court and the court below to be paid out of the trust fund.

Decree reversed and cause remanded.

PERPETUITIES WHICH ARE FORBIDDEN IN UNITED STATES. — Prior to the time of the enactment of the statute of wills and the statute of uses in England, it seems that no question of remoteness in the creation of estates and interests had come before the courts. But from this period, the transfer of estates to take effect *in futuro* began to be restricted in various ways, until the courts adopted generally, as the period beyond which estates might not be so limited as to be inalienable, the duration of a life or lives in being and twenty-one years after. This restriction is called the rule against perpetuities. Perpetuities are defined to be "grants of property wherein the vesting of an estate or interest is unlawfully postponed": *Philadelphia v. Girard*, 45 Pa. St. 26. The rule against perpetuities has been transferred to all the English colonies where the principles of the common law prevail: *Yeap Chea Neo v. Ong Cheng Neo*, L. R. 6 C. P. 381. Mr. Gray, in his work on the Rule against Perpetuities, p. 142, speaking of the form in which the rule came to the United States, says: "Considering the unformed condition of the doctrine of remoteness at the time of the planting of the American colonies, it would have been quite possible for it to have been developed there in a different shape from that it assumed in England. But as a matter of fact, the rule seems, in the absence of statute, to be always adopted throughout

the United States in its modern English form." The form of the rule, as stated by Mr. Gray, is as follows: "No interest subject to a condition precedent is good unless the condition must be fulfilled within twenty-one years after some life in being at the creation of the interest." The rule as stated in the principal case is the one generally found in the books. It is as follows: "If an estate be so limited as by possibility to extend beyond a life or lives in being at the time of its commencement, and twenty-one years and a fraction of a year (to cover the period of gestation) afterwards, during which time the property would be withdrawn from the market, or the power over the fee suspended, it is a perpetuity." Lewis on Perpetuity, 164; 4 Kent's Com. 287. The provision in the rule in regard to the period of gestation is said by Gray (p. 156) to be unnecessary, for the reason that one conceived is considered in law to be born, when for his benefit. In many of the states there have been statutory declarations and modifications of the rule, but it is generally, in its substance, left as here stated. Most of the changes have been in the direction of greater stringency. Thus in New York, and some of the states which have adopted its statutes, the general term "lives in being" used in the rule above is limited to "two lives in being." And the changes are directed mainly at the time during which alienation may be restrained. It is considered not to be within the scope of this note to include a collection of these statutes, but they may be found in convenient form in Gray on the Rule against Perpetuities, Appendix, B, C. It is proposed here to collect the cases in which and interests to which the rule against perpetuities has been applied in the United States.

It seems to be settled that in calculating time to determine whether a gift by will is too remote, the time runs from the testator's death, and not from the date of his will: 4 Kent's Com. 283, note 1; *Hosea v. Jacobs*, 98 Mass. 65; *Lang v. Ropke*, 5 Sand. 363; *Lang v. Wilbraham*, 2 Duer, 141; *Griffin v. Ford*, 1 Bosw. 123; *McArthur v. Scott*, 113 U. S. 340.

The contingency upon which an estate or interest in property is limited is one which must, and not which only may or probably will, happen within the period limited; otherwise the interest or estate sought to be created is void: *Sears v. Russell*, 8 Gray, 86; *Stephens v. Evans*, 30 Ind. 39. But it is sufficient if the estate begins within lives in being and twenty-one years, or within whatever time is provided by statute, though it may end beyond this period. Thus it is held that an estate may be limited to an unborn person for life, and if he be born within the time limited by the rule his interest is not bad for remoteness: *Otis v. McLellan*, 13 Allen, 339; *Loring v. Blake*, 98 Mass. 253; *Lovering v. Worthington*, 106 Id. 86; *Simonds v. Simonds*, 112 Id. 157; *Minot v. Taylor*, 129 Id. 160; *Goldborough v. Martin*, 41 Md. 488; *Heald v. Heald*, 56 Id. 300; *Wood v. Griffin*, 46 N. H. 230; *Donohue v. McNichol*, 61 Pa. St. 73. There are cases holding otherwise. Thus in the principal case, and in *Slade v. Patten*, 68 Me. 380, it is held that an immediate devise to trustees for children and their heirs violates the rule against perpetuities, and the reason assigned is that it is possible that the children might have heirs unborn at the testator's death, and in whom the estate would not vest within lives in being and twenty-one years and a fraction afterwards. But these cases are criticised in 14 Am. Law Rev. 237. The editor of this criticism, speaking of the latter case, says that it would seem from the language of the court that a trust which will not or may not terminate within lives in being and twenty-one years is void as creating a perpetuity, and that for this theory there is no authority whatever, for he says the real rule to determine whether a perpetuity is created is by ascertaining whether or not the estate or interest

sought to be created will vest within the time limited by the rule. See also Gray's Rule against Perpetuities, p. 167, note 3. In the case stated, the testator's children hold for life, and their heirs, if they have any, can take within twenty-one years, and therefore within the time limited by the rule against perpetuities. But see *Barnum v. Barnum* (the principal case), followed on this point in *Deford v. Deford*, 36 Md. 168; and *Goldsborough v. Martin*, 41 Id. 488. And see *Smith's Appeal*, 88 Pa. St. 492; *Thompson v. Livingston*, 4 Sand. 539.

INTERESTS WHICH ARE INCLUDED. — *Though Alienable, Interest may be too Remote.* — Though the effect of the rule against perpetuities generally is to prevent the tying up of estates, and though it has sometimes, and even often, been said that if future interests can be aliened or released the rule against perpetuities does not apply, this is not always true. For sometimes, as will be seen further in this note, interests, though alienable, may be too remote, and the rule may apply though there is no tying up of property. Thus a conditional limitation to a living person may be released or aliened, and still it may be too remote, and therefore void. In *Brattle Square Church v. Grant*, 3 Gray, 143, a house and lands were devised to deacons of a church and their successors, on the condition and limitation that the minister of said church shall constantly reside in said house, but that unless the house is used for this purpose the house and lands devised shall go to the testator's nephew; and it was held that the conditional limitation was too remote, and the deacons and their successors took an absolute fee.

Present Interests. — It will be noticed that the rule stated above applies only to future interests, and has no application to present interests: See *Lewis on Perpetuity*, 599; Gray on Rule against Perpetuities, sec. 279.

Vested Interests are not subject to the rule against perpetuities, for *ex ut termini* they are not subject to conditions precedent. Among such are reversions and vested remainders. On the distinction between vested and contingent interests, see chapter 3 of Gray's Rule against Perpetuities.

Contingent Remainders. — There is a conflict in the English decisions as to whether contingent remainders in legal estates should be subjected to the rule against perpetuities. Gray, after reviewing a number of authorities, comes to the determination that such interests are within the operation of the rule: Gray's Rule against Perpetuities, p. 213; and in this he follows the view of Lewis: *Lewis on Perpetuity*, c. 16, and supp. 97-153; so in 1 Jarman on Wills, 4th ed., pp. 255-258. And this seems to be the rule in the latest English case: *London etc. R. R. v. Gomm*, L. R. 20 Ch. D. 562. In *Wood v. Griffin*, 46 N. H. 230, it is held that contingent remainders are within the rule; and it is said that if it were not so a succession of particular estates might be limited to unborn persons, and inheritances thus followed for many generations, defeating the policy which dictated the rule in regard to perpetuities.

Rights of Entry for Breach of Condition. — Though in England it is held that rights upon breach of a condition are within and subject to the rule against perpetuities, *Dunn v. Flood*, L. R. 25 Ch. D. 629, *Lewis on Perpetuity*, 616, 617; this does not seem to be the law in the United States. In many cases which have come before the courts, conditions have been held good, and forfeitures for their breach enforced, without even a reference to the rules against remoteness; while in other cases where the matter has been expressly called to the attention of the courts, they have either disregarded the objection of remoteness entirely or held it to be of no force. *French v. Old South Society*, 106 Mass. 479, seems to be the only case in which the question has been

raised and considered directly. Here a pew was sold on condition that the grantee and his representatives should pay a tax assessed on the pew, and that if they should leave the meeting-house, they would offer the pew to the grantor. The court held that the condition in the conveyance was not void for remoteness, and cited *Brattle Square Church v. Grant*, 3 Gray, 142. In this case, and in *Tobey v. Moore*, 130 Mass. 448, and *Hunt v. Wright*, 47 N. H. 396, there are *dicta* to the effect that conditions are not within the rule against perpetuities. In *Giles v. Boston Society*, 10 Allen, 355, property was given on condition that the grantee should keep testator's tomb in repair. The court held that no breach of the condition had been shown, but said that if there had been a breach, and the words of conveyance were held to impose a common-law condition, that such condition would not be void for remoteness, and further said that conditions generally are exempt from the operation of the rule against perpetuities. In *Canal B. Co. v. Methodist Bel. Soc.*, 12 Met. 335, *Sharon I. Co. v. Erie*, 41 Pa. St. 341, *Indian O. Co. v. Sikes*, 8 Gray, 562, and *Lowe v. Hyde*, 39 Wis. 345, the question of remoteness was raised and argued by counsel, but the courts disregarded the point, and rendered decisions upholding the conditions. There are many other cases in which the objection was not made, and in which the conditions and forfeitures for breach were upheld and enforced: See *Cowell v. Springs Co.*, 100 U. S. 55; *Carter v. Doe*, 21 Ala. 72; *Indianapolis R. R. Co. v. Hood*, 66 Ind. 580; *Taylor v. Cedar Rapids Co.*, 25 Iowa, 371; *O'Brien v. Wetherell*, 14 Kan. 616; *Gray v. Blanchard*, 21 Pick. 284; *Austin v. Cambridgeport*, 21 Id. 215; *Guld v. Richards*, 16 Gray, 309; *Cornelius v. Ivins*, 26 N. J. L. 370; *Jackson v. Topping*, 1 Wend. 388; *Plumb v. Tubbs*, 41 N. Y. 442; *Sperry v. Pond*, 5 Ohio, 387; *Pickle v. McKissick*, 21 Pa. St. 232; *Horner v. Chicago R. R. Co.*, 38 Wis. 165; and in these cases the conditions were such as would violate the rule of perpetuities if within it.

Possibilities of Reverter are a class of fees which were probably put an end to by the statute of *quai emptores*; but in South Carolina and Pennsylvania, where tenure still exists, such interests may still be created, unless they are too remote. There are no decisions upon this point, but from the analogy to conditions, it would seem that they are not void for remoteness: Gray on Perpetuities, p. 224.

Limitations to Class, as, for instance, to the grandchildren of the testator, are good, if in their form it is not possible for the bequest to vest later than twenty-one years after the testator's death. But it may in most gifts of this character happen that grandchildren will be born after the death of the testator and twenty-one years, and the class of legatees is not the same which existed within the time limited by the rule. In such case the gift would be void for remoteness: *Lowry v. Muldrow*, 8 Rich. Eq. 241; *Hill v. Simonds*, 125 Mass. 536; *Moore v. Moore*, 6 Jones Eq. 132; *Goldborough v. Martin*, 41 Md. 488; *Caldwell v. Willis*, 57 Miss. 555; but see, *contra*, *Sears v. Russell*, 8 Gray, 86; *Lovering v. Lovering*, 129 Mass. 97.

Trusts. — The rule against perpetuities applies as well and in the same manner to equitable as to legal estates: Gray on Perpetuities, secs. 411 et seq.; 1 Perry on Trusts, sec. 382 et seq.; *Schutter v. Smith*, 41 N. Y. 329; *Knob v. Jones*, 47 Id. 397; *Burrill v. Boardman*, 43 Id. 254; *Sears v. Putnam*, 102 Mass. 5; *Lovering v. Worthington*, 106 Id. 86; and the same test as in the case of legal estates will determine whether trusts are void for remoteness. A testator cannot devise in trust directly an estate or interest which would contravene the rule against perpetuities; and so it is likewise held he cannot authorize his trustees to limit an estate beyond the period provided by the

rule against perpetuities: *Fonds v. Fenfield*, 56 Barb. 503. Trusts cannot be created with a proviso that the interest of the *cestui que trust* shall not be alienated or charged with his debts: *Blackstone Bank v. Davis*, 21 Pick. 43; *Sparkbrook v. Cloon*, 125 Mass. 262; *Daniels v. Eldredge*, 125 Id. 350. Where, however, the trustees have an arbitrary power to apply the income of property, the *cestui que trust* has no interest which he can enforce, and hence such a trust would not be void as in restraint of alienation: *Hall v. Williams*, 120 Id. 344. And this will be found to be the case in a number of trusts for the benefit of married women, to prevent their anticipating the income by assignment or transfer of it: *Pickering v. Coates*, 10 Phila. 65; *Ash v. Bowen*, 10 Id. 96.

Trusts for accumulation of rents, profits, income, or interest are void, as other trusts, if they prevent the beneficial enjoyment of property for a period longer than lives in being and twenty-one years: *Foedick v. Foedick*, 6 Allen, 43; *Hooper v. Hooper*, 9 Oush. 122; *Thorndike v. Loring*, 15 Gray, 391; *Kilham v. Allen*, 52 Barb. 606; *Hillyard v. Miller*, 10 Pa. St. 326. A bequest made subject to a trust for accumulation may be good, though the trust be void as violating the rule against perpetuities, if the trust can be stricken out without destroying the substantial form of the gift: *Haatus v. Cora*, 2 Barb. Ch. 506; *Craig v. Craig*, 3 Id. 76; *Williams v. Williams*, 8 N. Y. 525; *Phelps v. Pond*, 23 Id. 69; *Kilpatrick v. Johnson*, 15 Id. 322; *Hawley v. James*, 5 Paige, 318; *Philadelphia v. Girard*, 45 Pa. St. 1. But where the gift is given to take effect after the accumulation, which itself is void for remoteness, the gift is bad: *Amory v. Lord*, 9 N. Y. 403. In New York, Alabama, Michigan, Wisconsin, and Minnesota the common-law rules concerning accumulations are changed, and accumulations are allowed for certain specified periods. In Pennsylvania, only the excess over the accumulations for the term of a life or lives in being and twenty-one years is void: *Purd. Dig.*, p. 853, sec. 9.

Charitable trusts are said not to be subject to the rule against perpetuities. This is only in a measure true. Charitable trusts are inalienable, for no one has alienable rights, and in this sense they are not void: *Gray on Perpetuities*, sec. 590; *Dartmouth College v. Woodward*, 4 Wheat. 518. But this does not imply that charitable trusts may be created so as to begin in the remote future, and a provision of the latter nature will generally render a trust void: *Philadelphia v. Girard*, 45 Pa. St. 26; *Yard's Appeal*, 64 Id. 95. The question may arise in various ways. A gift over to an individual after a charitable trust is held subject to the rule against perpetuities: *Brattle Square Church v. Grant*, 3 Gray, 142; *Wells v. Heath*, 10 Id. 17; *Theological Soc. v. A. G.*, 135 Mass. 285; and likewise where the gift is to an individual and then over to a corporation or person on a charitable trust: *Leonard v. Burr*, 18 N. Y. 96; *Smith v. Townsend*, 32 Pa. St. 434.

If instead of being a gift over after another bequest, the gift is made to a charity upon the happening of a contingent event as a condition precedent, it is held that if the condition is too remote, or for any other reason illegal, the gift to the charity is void: *Jocelyn v. Nott*, 44 Conn. 55; *Attorney-General v. Jolly*, 2 Strob. Eq. 369.

A charitable gift to a body to be incorporated depends upon the doctrine of *cy pres*. In those states where it is held or declared that the courts have power to administer a charitable trust *cy pres*, the gift would be good. In states where the power is denied, the gift would be void for remoteness. The power is denied by statute in New York, Michigan, Minnesota, and Connecticut, and by the courts in other states: See *Carter v. Balfour*, 19 Ala. 814;

White v. Fisk, 22 Conn. 31; *Hughes v. Daly*, 49 Id. 34; *Grimes v. Harmon*, 35 Ind. 198; *Miller v. Chittenden*, 2 Iowa, 315; *Byers v. McCartney*, 62 Id. 339; *Methodist Church v. Clark*, 41 Mich. 730; *Little v. Wilford*, 31 Minn. 173; *State v. Warren*, 28 Md. 338; *Green v. Allen*, 5 Humph. 170; *Baptist Ass'n v. Hart*, 4 Wheat. 1; *Gallego v. Attorney-General*, 3 Leigh. 450; *Carpenter v. Miller*, 3 W. Va. 174; *Pearse v. Post*, 20 Wend. 111; *Beckman v. Bonsor*, 23 N. Y. 293.

MICHAEL v. MOREY.

[26 MARYLAND, 239.]

DISTINCT EXPRESSION OF OPINION BY COURT IS NOT ORITER DICTUM, where given in response to a question of equitable jurisdiction, directly involved in the issues of law, and raised by demurrer to the bill, and to which the mind of the court was directly drawn.

ANTENUPTIAL AGREEMENT WHEREBY WIFE MAKES OVER TO HER HUSBAND in consideration of the marriage certain of her lands and property, on the condition that if he shall survive her he will pay over certain sums and property to the child or children which she may leave, and if she leave more than one child, that he will distribute and pay over such sums and property among all said children, share and share alike, is broad enough to include all the children of the covenantor or *cestui que trust*, whether they were born before said marriage and were the issue of a former marriage, or were born thereafter.

MARRIAGE IS VALUABLE CONSIDERATION, AND WILL NOT ONLY SUSTAIN COVENANTS in favor of the wife and the issue of the marriage, but also covenants for settlements in favor of children of a former marriage, as a moral consideration.

UNDER CONTRACT IN CONSIDERATION OF MARRIAGE, containing covenants in favor of issue of the marriage, the children are regarded as purchasers; they may enforce the obligations of the contracting parties, notwithstanding the non-performance of mutual stipulations on the other side, unless they are conditional and dependent covenants.

BILL in equity to recover the sum of \$4,250 and interest, claimed under an antenuptial agreement between Isaac Michael and Catharine Baker, his deceased wife. The part of the agreement necessary to an understanding of the opinion was as follows: "1. The said Catharine Baker, being possessed in her own right of money, choses in action, book-accounts, and other personal property, to the amount of \$4,250, doth hereby transfer, assign, and convey the same to the said Isaac Michael, his executors, administrators, and assigns, and the said Isaac Michael, in consideration of the sum of \$4,250, doth covenant and agree with the said Catharine Baker, her executors, administrators, and assigns, to pay her, the said Catharine Baker, during her life, notwithstanding her coverture, the annual interest arising on the said sum of money, annu-

ally, in each and every year, for her sole, separate, and exclusive use and benefit, free from his marital rights; and in case the said Isaac Michael should die before the said Catharine Baker, he, the said Isaac Michael, doth bind his heirs, executors, and administrators to pay to the said Catharine Baker, her executors, administrators, or assigns, the said sum of \$4,250, with any interest which may be due thereon. And it is further stipulated and agreed on, by and between the said parties, that any receipt signed by the said Catharine during her coverture, for the interest, shall be as full and complete a discharge as if she were sole. And it is further agreed by the said parties that the said Catharine Baker shall be at full liberty to devise and bequeath the said sum of \$4,250, and any interest which may be due thereon, as if she were a *feme sole*, and that he, the said Isaac, will consent to any will or wills, or any codicil or codicils, which she, the said Catharine, may make during her coverture with the said Isaac Michael, and that he will assent to the same writing; and in default of any will or codicil, he, the said Isaac Michael, binds himself, his heirs or administrators, in the event of his surviving, to pay the said sum of money to any child or children which she may leave, and in the event of leaving more than one child, to distribute and pay the said sum of money equally among all, share and share alike." Complainants (Caroline M. Baker and her husband joined with her) alleged the marriage of Michael and Catharine Baker; that the said Catharine Baker or Catharine Michael, in pursuance of her power of disposition under said agreement, made her will, by which she devised all of her estate to said Caroline M. Baker, and her heirs and assigns forever; and that said Catharine died without leaving any children by Michael, or at all, except the said Caroline M. Baker, her daughter by her former husband. Complainant also alleged that Michael had paid the interest on said \$4,250, mentioned in the agreement aforesaid, to said Catharine, up to the 4th of February, 1854; but that since that date he had not paid the interest nor any part of it to her or her representatives; and claimed that the said sum of \$4,250, and the interest thereon since February 4, 1854, was held in trust for said Caroline M. Baker, and asked a declaration of that fact, and payment to complainants of the sum due. Defendant admitted the allegations in the bill, but denied the validity of the marriage contract on the ground of fraud and deceit, in that he was not informed of and did not know of

the existence of the child, Caroline M. Baker; and for the reason that the said Catharine after the marriage refused to perform her marriage vows, and finally denied complainant's right to the money for the reason that Caroline M. Baker was not a child of the marriage, and that only such were contemplated in the agreement above set out. Decree for complainants. Defendant appealed.

Joseph M. Palmer, for the appellant.

Richard H. Marshall and William J. Ross, for the appellees.

By Court, BOWIE, C. J. The contract, the true construction and legal effect of which is the subject of the present appeal, was before this court in the case of *Morey v. Michael*, 18 Md. 228, brought up by appeal of the appellee, Caroline, as executrix of Catharine Michael, from a decree dismissing the bill on demurrer.

That suit was presented by her as executrix, and the demurrer overruled by this court, upon the ground that although the will executed by Mrs. Michael was not a good execution of the power as to the principal sum covenanted to be paid by Isaac Michael, yet the interest accruing during the coverture was the sole and separate estate of the wife, which she might bequeath independently of the power.

In the argument of that case, a prominent point on the part of the appellee was, as in this, that the appellant's remedy, if any, was in a court of law, and not in equity; that the only object of the bill was to recover a specific sum of money, and interest upon a covenant to pay. In other words, it was a contract for the payment of money to be enforced at law, not a trust resting in confidence of which equity had cognizance.

It became necessary, therefore, in deciding that point, which went to the jurisdiction of the court, and which, if tenable, would have compelled this court to sustain the demurrer, to examine the character of the instrument exhibited with the bill (which is the same now exhibited by the appellees with their bill), and determine the rights of those claiming under it, particularly the relation of the appellee in that case (now the appellant) to the principal fund.

The views of the court on this point are thus expressed:—

"The appellee took the legal title to the property under the contract, with limitations against any beneficial use or interest in himself, and a determination of the character of his relation

to it will decide the question of jurisdiction presented by the demurrer. Although the contract in some respects is inartificially drawn, it is clear that the intent of the parties to it was to fix upon the appellee a fiduciary possession of the fund assigned, and create a trust by which the purpose of the testatrix as to its beneficial use and ultimate destination would be accomplished."

The creation of a trust depends upon intention, and when expressions used manifest an intention that the grantee or donee of property is not to have the beneficial use, but is to hold it for the benefit of another, he will be considered as a trustee holding the legal title for the beneficial owner.

"A gift or grant of property to a grantee or donee to be applied to a certain use or purpose fastens a trust on the holding of the legal estate": Hill on Trustees, 65; *Bristow v. Warde*, 2 Ves. Jr. 335; *Moore v. Darton*, 7 Eng. L. & Eq. 134; *Ware v. Richardson*, 3 Md. 505. In this case, we think the appellee took the property assigned by the contract as a fund, with the interest as it might or should accrue in the lifetime of the testatrix, encumbered with a trust, and notwithstanding the form of his obligation in reference to it, relief in equity may be had for any failure or default on his part in its execution": *Morey v. Michael*, 18 Id. 240, 241.

Although this point may not have been as fully argued in the former case as in the present, yet it cannot be said that the decision just cited was *obiter dictum*, as the question was directly involved in the issues of law raised by the demurrer to the bill, and the mind of the court was directly drawn to and distinctly expressed upon the subject.

We consider this construction of the instrument in question conclusive on this point, not because it was made in a suit between the same persons but different parties, but because the point was "investigated with care, and considered in its fullest extent," which is all that is necessary in this state to render a decision binding as a precedent: *Alexander v. Worthington*, 5 Md. 488, 489.

The jurisdiction of this court being established, the second point raised by the appellants is, that the appellee, Caroline, is not a *cestui que trust* under the antenuptial contract, which should be construed to embrace only a child or children of the marriage which the said Catharine might leave at the time of her death.

This construction is based upon the assumption that there

is no allegation in the bill or evidence in the cause that Isaac Michael knew his intended wife had any child living at the time of their entering into the contract, and the fact that the antenuptial contract does not refer to any such person specifically.

It must be conceded there is no reference to the fact of a prior marriage on the part of Mrs. Catharine Michael, or of her being a mother, in the agreement referred to, but the bill expressly charges she was a widow, and had an only child of tender years dependent on her, and the answer of the appellant admits the complainant, Caroline, is the child of Catharine by a former marriage, and there was no issue by her second husband. With these facts, it would be a most unnatural as well as forced construction which would confine the general terms of an antenuptial contract which are broad enough to include all the children of the covenantor or *cestui que trust* to those only she might thereafter have, and thus exclude the issue of the first marriage from all benefit of the estate of her mother previously acquired.

The complainant is clearly within the letter as well as the spirit of the contract, as indicated by the circumstances of the contracting parties. The appellant's answer insists that Catharine Michael violated all the stipulations of the marriage contract without any cause whatever, which he is advised renders all the covenants and stipulations to be performed after the death of the said Catharine utterly null and void, and that he is not, in equity, bound to comply with or perform any of the covenants in said contract not to be performed in the lifetime of the said Catharine. This position is not, in our judgment, sustained by reason or the weight of authority.

Although the articles of agreement between Michael and Baker recite that a marriage is about to be entered into by and between the parties, "and in consideration thereof" the parties agreed to enter into the following covenants and stipulations, it is also recited: "1. The said Catharine Baker, being possessed in her own right of money, etc., to the amount of \$4,250, doth transfer, assign, and convey the same to the said Isaac Michael," and the said Isaac Michael, in consideration of said sum, "doth covenant and agree to pay, etc., in default of appointment, to any child or children she may leave." It also appears from the said articles that Catharine

Baker owned and occupied a house and lot in Middletown, the rents and profits of which it was agreed she should receive during coverture for her separate use, with power to sell the same and invest the proceeds as she may direct, for her sole and separate use. And the said Michael covenanted and agreed that the said real estate, or any other she might purchase during the coverture, she might bequeath, or the proceeds thereof, and in default of appointment, that such real estate shall descend to and be distributed among any children she may leave, if more than one; if only one child, that such child shall receive the whole personal estate and real estate which she, the said Catharine, may leave; and it was further agreed that nothing in said articles contained shall debar the said Catharine Baker from any right which she may acquire by virtue of her intermarriage with the said Michael, either in the real or personal estate of said Isaac Michael.

The articles show that the intended wife was possessed in her own right of both personal and real estate, the right of disposing of which she was determined to secure, notwithstanding her marriage, without surrendering her rights in the real and personal estate of her intended husband.

They further show the real estate and the proceeds thereof were to descend to or be distributed among any children she might leave, and if only one, that child should receive the whole personal estate and real estate that Catharine Baker might leave.

It would be impossible to imagine that terms so clear and comprehensive as these would not include the only child of her first marriage; and if they received such construction when applied to the real estate, why adopt a different construction of words nearly identical when speaking of the personal? It might justly be contended, also, that the words annexed to the covenant relating to the real estate, being subsequent to all others, are broad enough to include, and do include expressly, the whole personal and real estate which Catharine Baker might leave.

The consideration of marriage is a valuable consideration, and not only sustains covenants in favor of the wife and the issue of the marriage, but also covenants for settlements in favor of children of a former marriage as a moral consideration: Crui. Dig., tit. 32, Greenleaf's ed., sec. 752. The children are regarded as purchasers. They may enforce the obligations of the contracting parties, notwithstanding the non-perform-

ance of mutual stipulations on the other side, unless they are conditional and dependent covenants.

Although the defaulting party may not, in some instances, be allowed to enforce the articles specifically, the children, the innocent objects of parental solicitude and care, are entitled to all the benefit of the uses under the settlement, notwithstanding there has been a failure on one side: *Macqueen on Husband and Wife*, sec. 3, tit. Antenuptial Agreements, and cases there cited.

These reasons include as well the issue of a former as a subsequent marriage. There can be no equity in inflicting upon the only child of a former marriage, dependent on its mother for support, in whose behalf provision was made in anticipation of a second marriage, the penalty of forfeiture because of the subsequent misconduct of her mother.

In the case of *Sidney v. Sidney*, 3 P. Wms. 274, 276, where the bill was filed by the wife for specific performance of marriage articles, and the defense was she had withdrawn herself from her husband, lived separately from him, and very much misbehaved herself, although there was a violent presumption of adultery, the Lord Chancellor Talbot held that "the articles being that the husband shall settle such and such lands in certainty on his wife for her jointure, this is pretty much in the nature of an actual and vested jointure; in regard to what is covenanted for a good consideration to be done is considered in equity as done, consequently this is a jointure, and not forfeitable either by adultery or elopement, and it was decided that the husband should perform his marriage articles": *Vide* also *Blount v. Winter*, 3 P. Wms., note 2; *Buchanan v. Buchanan*, 1 Ball & B. 205, marg. page.

The cases referred to by the appellant to sustain his defense are generally cases where the application was on the part of the defaulting party for a settlement out of her separate estate, in the absence of articles of agreement,—in which, of course, the parties would be remitted to purely equitable rights. Such are the cases cited: 1 *Roper on Husband and Wife*, 275; *Carr v. Eastbrooke*, 4 Ves. 146.

Roper remarks: "It may be inferred from *Bell and Montgomery*, that though the court may not make a settlement on the wife when living in adultery, yet it will secure her trust property for the benefit of the survivor or her children." This principle is recognized in many of the cases. There is no pretense here, however, of any misconduct on the part of the wife

greater than the use of intemperate language and separation from her husband because of unhappy domestic circumstances. There is no ground for any imputation upon her purity as a wife. She maintained reputable associates, notwithstanding her separation.

Decree below affirmed, with costs to the appellees.

MARRIAGE SETTLEMENTS GENERALLY, and who may enforce: See the note to *Merritt v. Scott*, 50 Am. Dec. 371 et seq.

THE PRINCIPAL CASE IS CITED in *Sewall v. Wilmer*, 132 Mass. 134, to the point that the intention to execute a power of appointment by will must appear by a reference in the will to the power or to the subject of it, or from the fact that the will would be inoperative without the aid of the power.

WILMS v. WHITE.

[26 MARYLAND, 380.]

WHERE DECLARATION IN SLANDER COMMENCED, "J. W., by her next friend, H. A., by her attorney, J. D. B., sues F. C. B. W. for: 1. The said J. W. is of the age of twenty-one years and a *feme sole*," etc., and then charged the slanderous words, it was held that the words "by her next friend," in the commencement of the *narr.*, being followed by other words, "by J. D. B., her attorney," were obviously misrecital and mere surplusage, *utile per inutile non vitiatur*, the previous entries of the record showing that she acted by attorney.

COMMENCEMENT OF NARR. IS MERE RECITAL OF WRIT, and not a necessary part of a declaration, under article 75 of the Maryland code, which declares that it shall not be necessary to state any formal commencement or conclusion to any declaration or other plea.

NO GENERAL DEMURRER IS ALLOWED FOR MERE INFORMAL STATEMENT OF CAUSE OF ACTION OR DEFENSE, "provided such statement is sufficient in substance."

VARIANCE BETWEEN WRIT AND DECLARATION WOULD BE CURED BY VERDICT under the old forms of pleading.

DEFENDANT MUST PLEAD IN ABATEMENT, IF HE WISHES TO AVAIL HIMSELF of the plaintiff's incapacity to sue, in a court of general jurisdiction.

ERRORS RELATING TO FORM OF PROCESS, AND NOT TO CAUSE OF ACTION, and which are in the nature of dilatory pleas, are not favored in law.

EXEMPLARY DAMAGES ARE PROPERLY ALLOWED IN ACTIONS FOR DEFAMATION of character of chaste *feme sole*.

IN ABSENCE OF STATUTORY RULE OF DAMAGES IN ACTION FOR SLANDER, where exemplary damages are sought to be recovered, the fact of the wealth of defendant is admissible in evidence and pertinent to the issue, to show his rank and influence in society as the result thereof, and the consequent increased damages from his high standing.

IF EVIDENCE IS ADMISSIBLE FOR ANY PURPOSE in the inquiry before the jury, it would be error to exclude it as irrelevant and inadmissible under the general exception.

ACTION for slander. The opinion states the facts.

R. H. Alvey, for the plaintiff in error.

A. K. Syester, for the defendant in error.

By Court, BOWIE, C. J. Two questions are presented by the record in this case: 1. The sufficiency of the declaration in law; 2. The admissibility of certain evidence offered by the plaintiff below, and excepted to by the defendant.

After verdict, the defendant moved in arrest of judgment, which motion being overruled, and judgment entered for the plaintiff below, the defendant, Wilms, sued out a writ of error.

The error assigned is, that the plaintiff below sued and recovered judgment by her "*prochein ami*, when it appears from the record she was of full age."

The writ was issued on the 11th of September, 1863, at the suit of Julian White, by her next friend, Jacob White, returnable on the 23d of November, 1863, when it was returned "summoned."

The defendant appeared, and laid the plaintiff under rule *narr.*

On the 29th of January, 1864, the plaintiff declared in the name of Julian White, "by her next friend, Jacob White, by James D. Bennett, her attorney."

In this *narr.* it is averred "the said Julian White is of the age of twenty years, and a *feme sole*."

At March term, 1864, it appears from the record that "Julian White, by her said attorney," prayed leave of the court to amend the writ of summons, and it was granted; and thereupon, on the eighth day of March, 1864, the said plaintiff, by her attorney aforesaid, declared anew against the defendant, which declaration commences: "Julian White, by her next friend, Hezekiah Alsip, by James D. Bennett, her attorney, sues Frederick C. B. Wilms for,—

"1. The said Julian White is of the age of twenty-one years, and a *feme sole*," etc.

It thus appears that the amended declaration, to which the defendant was ruled to plead last, was a *narr.* filed after the plaintiff became of full age, and after she had appeared by attorney and prayed leave to amend the writ of summons.

The words "by her next friend," in the commencement of the amended *narr.*, being followed by the other words, "by James D. Bennett, her attorney," were obviously misrecital and mere surplusage, *utile per inutile non vitiatur*, the previous

entries of the record showing she acted by attorney. This commencement of the *narr.* is mere recital of the writ, and not a necessary part of the declaration. The code, article 75, declares it shall not be necessary to state any formal commencement or conclusion to any declaration or other plea.

No general demurrer shall be allowed for a mere informal statement of a cause of action or defense, "provided such statement is sufficient in substance."

If this was a case of variance between the writ and declaration, it would be cured by verdict under the old forms of pleading: *Giles v. Perryman*, 1 Har. & G. 171; 1809, c. 153, sec. 2; and *Raborg v. Bank of Col.*, 1 Id. 234, 238.

In a court of general jurisdiction, a defendant, if he wishes to avail himself of the plaintiff's incapacity to sue, must do so by plea in abatement: *Shivers v. Wilson*, 5 Har. & J. 132 [9 Am. Dec. 497].

In the case of *Graham v. Fahnestock*, 5 Gill, 215, the defendant pleaded in bar, without verification under oath, that at the time of the commencement of the action "the plaintiff, who declared by attorney, and not by guardian or next friend, was an infant," the plaintiff moved that the plea be rejected, which was done. Upon appeal, this court held the plea was properly rejected; the subject of the plea was matter in abatement, and not in bar, and it was not verified by affidavit, without which it could not have been received.

The error relied upon here is not that, being in fact an infant, she sued by attorney, but being in fact an adult, the plaintiff sued by *prochein ami*. It is an objection to the form of the process, and not to the cause of action, and being in the nature of a dilatory plea, is not favored in law. If a party may pretermitt the opportunity of pleading in abatement, proceed to trial, and failing in his defense on the merits, after verdict raise objections of form rather than substance, irreparable injury might be inflicted. Such is not the principle of pleading at the present day.

The plaintiff below, after offering evidence tending to prove the defamatory words charged in the declaration, and circumstances of aggravation, proposed to prove what were the pecuniary circumstances of the defendant below, that he was a man of wealth, with a view to exemplary damages, to which the defendant below objected as irrelevant and inadmissible testimony, and his objection being overruled, prayed leave to except.

The ground of this exception is, if we correctly apprehend

the argument of the counsel for the plaintiff in error, that damages in the action of slander are merely compensatory, and not punitive, and it was therefore immaterial in estimating them whether the defendant was poor or rich.

It would open a wide field of speculation to enter into the question *de novo*, and decide upon abstract principles what circumstances constitute the elements of injury.

This action is founded upon an article of the code (89 Public General Laws) making "all words spoken maliciously touching the character or reputation for chastity of a *feme sole*, and tending to the injury thereof," slander, and providing that "any *feme sole*" may sustain an action of slander against any person defaming or traducing her. The rule or measure of damages is not prescribed as in some statutes, but is left to be determined by the principles of the common law in other actions of tort.

Distinguished text-writers on the law of evidence and damages are at issue as to the principle on which adjudged cases have been determined. Perhaps they are irreconcilable.

Mr. Greenleaf, in his Law of Evidence, says: "Nor are damages to be assessed merely according to the defendant's ability to pay, for whether the payment of the amount due to the plaintiff as compensation for the injury will or will not be convenient to the defendant does not at all affect the question as to the extent of the injury done, which is the only question to be determined. The jury are to inquire, not what the defendant can pay, but what the plaintiff ought to receive. But so far as the defendant's rank and influence in society, and therefore the extent of the injury, are increased by his wealth, evidence of the fact is pertinent to the issue": 2 Greenl. Ev., tit. Damages, sec. 269.

Sedgwick insists, "whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system, or even language, of compensation, adopts a wholly different rule,—it gives damages not only to recompense the sufferer, but to punish the offender": *Vide* Sedgwick on Damages, 666, and authorities there cited. The testimony offered in this case was competent under either theory.

The rank and influence of the defendant in society may, in this case, have depended on his wealth. There was nothing in the offer of the plaintiff below to show that the wealth of the defendant was an element *per se* of damages; and if the

evidence was admissible for any purpose in the inquiry before the jury, it would have been error to exclude it as irrelevant and inadmissible under the general exception.

This court, in the case of *Gaither v. Blowers*, 11 Md. 553, which was an action for assault and battery of an aggravated character, inquiring into the admissibility of evidence as to the plaintiff's circumstances, with a view of increasing the damages, refer with approbation to 2 Greenl. Ev., sec. 89, where it is said: "Nor are the jury confined to the mere corporal injury which the plaintiff has sustained, but they are at liberty to consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon to award such exemplary damages as the circumstances may in their judgment require." Exemplary damages are here recognized as a right of the plaintiffs, without regard to the question whether they are allowed as compensation or punishment. In the same case, this court adopts the language of the court in *McNamara v. King*, 2 Gilm. 436, as follows: "It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured. In this class of cases the jury may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant." This, like the principal case, was one of assault and battery. But in the case of *McAlmont v. McClellan*, 14 Serg. & R. 359, in an action of slander, the supreme court of Pennsylvania declared: "Damages are given by way of example. That which would be exemplary as to one would not make another feel,—would be no terror to him."

Personal injuries accompanied by force are subjects of prosecution and punishment by the state, as well as of compensation in damages to the injured; but verbal slander is not subject to public punishment. If the former, therefore, should be prevented or redressed by exemplary damages, defamation of character, especially the sacred and inestimable reputation for chastity of *femes sole*, should be vindicated by the largest allowance of pecuniary remuneration when falsely and maliciously assailed. There being no error in the action of the court, the judgment will be affirmed.

Judgment affirmed.

PEOPLE'S BANK OF BALTIMORE v. KEECH.

[26 MARYLAND, 521.]

WHERE PROMISSORY NOTE IS EXPRESSLY AND UPON ITS FACE MADE PAYABLE at a certain bank, a demand at that bank is sufficient, and no parol evidence of any custom at the bank giving the note a different construction is admissible to alter the contract.

NOTICE OF DISHONOR OF PROMISSORY NOTE, SENT TO ONE OF TWO PAYEES and indorsers, though in the name of and for both of them, where they reside in different towns, is not notice to the one to whom no notice was actually sent.

NOTICE OF DISHONOR OF PROMISSORY NOTE, SENT TO ONE OF TWO JOINT PAYEES and indorsers, though in the name of and for both of them, will not bind the one not served; and since he will be discharged, the other, as a necessary legal consequence, is also discharged, for where the engagement of several persons is as joint debtors, the discharge of one by the act or default of the creditor discharges all.

ASSUMPSIT. The opinion states the facts.

Thomas F. Bowie, for the appellant.

Thomas G. Pratt and Daniel Clarke, for the appellee.

By Court, BARTOL, J. The promissory note sued on in this case was drawn by Hall and Anderson, payable to the order of C. S. Keech and R. D. Hall, and by them indorsed; the note afterwards, by successive indorsements, came to the possession of the appellant, who held it at its maturity, and the note being dishonored, brought this suit against the indorsers, Keech and Hall; during the progress of the cause, Hall, one of the defendants, died, and the suit was continued against the survivor, the present appellee.

The questions before us arise upon two bills of exceptions taken at the trial, and these resolve themselves into the single inquiry, whether the notice of the demand and non-payment of the note was sufficient to bind the defendants, Keech and Hall, or either of them.

We lay out of view all consideration of the record offered in evidence in the second exception, showing that in a suit upon the note instituted by the appellants against the administrators of Richard D. Hall, deceased (one of the joint indorsers), the plaintiff suffered judgment of *non pros.*, because such a judgment could not conclude the rights of the parties, or operate in law to discharge the appellee. Nor can there be any question upon the bills of exceptions as to the sufficiency of the demand of payment. The note was on its face payable "at People's Bank of Baltimore," in express

terms, and a demand at the bank was therefore sufficient; such is the legal construction of the writing, and no parol evidence of any custom at the bank giving the note a different construction could be allowed to alter the contract.

The evidence in the first bill of exceptions shows that the proper post-office of R. D. Hall was Beltsville, and that of C. S. Keech was Upper Marlborough; the notarial certificate shows that the notice to both the indorsers was sent to Upper Marlborough. According to all the authorities, that was not legal notice to Hall, and would not bind him, unless it can be held that, being joint payees and indorsers, notice to one is sufficient. Unquestionably, such would be its effect if they were partners; upon that point the authorities all agree it has been so held in Maryland: See *Baughner v. Duphorn*, 9 Gill, 315.

In a case of partnership, one partner is the general agent of the firm, and may bind his copartners in any matter within the general scope of the partnership. It is upon this ground the principle of law has been established that notice to one member of the firm of the dishonor of a note indorsed by the firm will bind all the partners.

In this case Keech and Hall were not partners; they were simply joint payees and indorsers, and the question arises, whether the same rule applies as in the case of partners, or whether each must have notice. This question does not appear from any reported case to have been decided in Maryland. It arose before the king's bench in *Cawick v. Vickery*, 2 Doug. 653, note, in which the precise question was as to the validity of an indorsement of a note by one of two joint payees who were not partners. The judges expressed the opinion that the joint payees must be considered as partners *quoad* the particular transaction. But afterwards, at the trial of the same case before Lord Mansfield, when evidence was offered to prove "that by the universal usage and understanding of all the bankers and merchants in London the indorsement was bad because not signed by both payees," his lordship, whose opinion upon a question like this is entitled to very great weight, said "he did not think the question was so decided as to preclude the evidence offered." And upon the usage, which appeared to be so well known to all the jury that they required no evidence to support it, the verdict was given for the defendant.

The question does not appear to have arisen afterwards in

England, and it may be inferred that the rule of commercial law, in conformity with the usage settled by the verdict in that case, has remained there undisturbed.

It will be observed that the precise point settled in *Cawick v. Vickery*, *supra*, is not identical with the one now presented; there the question was as to the sufficiency of an indorsement by one; here the question is as to the effect of a notice of the dishonor of the note given to one of the indorsers only. But it is obvious that the questions depend upon the same principles, and must be decided in the same way.

There is some conflict in the decisions on this point by the courts of this country. But the weight of authority, as well as of reason, appears to us to be in accordance with the judgment finally pronounced in *Cawick v. Vickery*, *supra*, and the established commercial usage in England.

The cases in which the contrary doctrine has been decided or intimated by the courts in this country are *Dodge v. Bank of Kentucky*, 2 A. K. Marsh. 615; *Higgins v. Morrison*, 4 Dana, 105; and *Goddard v. Lyman*, 16 Pick. 269, 270. (The cases of *Cocke v. Bank of Tennessee*, 6 Humph. 51, and *Harris v. Clarke*, 10 Ohio, 5, cited by appellees' counsel on this point, we have not had an opportunity to examine.)

The cases in Kentucky above referred to appear to have been decided without much consideration of this point; in the opinions pronounced, the question is not discussed, nor are any authorities cited, the court simply declaring that joint payees of a note are to be considered as partners *quoad hoc*.

In *Goddard v. Lyman*, 14 Pick. 268, the note which was sued on was drawn by the defendant, payable to E. Warren, J. J. Cutler, and A. Fleming (who were not partners); two of them indorsed it to E. Warren and H. A. Green, a stranger; afterwards, E. Warren indorsed it as follows: "I order the contents of this note, so far as I am interested therein, to be paid to H. A. Green, or order,—E. Warren"; then H. A. Green indorsed it to the plaintiff; and the question was, whether these indorsements were sufficient to vest the title in the plaintiff, and enable him to sue thereon.

The court held that the indorsement of two of the joint payees to the other payee and a stranger was a legal transfer of the note; or if this be doubtful, the further indorsement by the third payee to the stranger would pass the property, upon the plain principle that "by such indorsements the assent of all the payees to the transfer is manifested."

In pronouncing the opinion of the court in that case, Mr. Justice Wilde states that joint payees of a note, though not general partners, make themselves partners as to the transaction, and refers to *Cawick v. Vickery*, 2 Doug. 653, in support of the proposition. So far as this expression is concerned, the opinion of the learned judge was clearly *obiter*, that point not being involved in the case.

This question arose in *Shepard v. Hawley*, 1 Conn. 367; *State Bank v. Slaughter*, 7 Blackf. 133; *Sayre v. Frick*, 7 Watts & S. 383 [62 Am. Dec. 249]; and *Willis v. Green*, 5 Hill, 232 [40 Am. Dec. 351]; and in all of them it was held that cases of partners and those of mere joint payees stand upon different principles. In the former, the firm is bound by notice to one of the copartners, because each represents the firm and is general agent of all; but in the latter, the rights and interests of the parties are distinct; though jointly entitled, they are mere tenants in common; neither can legally represent the other without being specially authorized, and therefore notice to one is not sufficient to bind the other.

Without quoting at length from the cases above cited, we refer to the very full and elaborate opinions of Swift, C. J., and Goddard, J., in *Shepard v. Hawley*, *supra*; of Chief Justice Gibson, in *Sayre v. Frick*, *supra*; and of Nelson, C. J., in *Willis v. Green*, *supra*; which we think place the question upon correct principles. See also Story on Bills, sec. 299; Chitty on Bills, 496 m; *Bank of Chenango v. Root*, 4 Cow. 126; *Beals v. Peck*, 12 Barb. 251.

It follows from what has been said that notice of the dishonor of the note in this case not having been given to Hall, he could not be held liable as indorser, and as a necessary legal consequence, Keech, the appellee, cannot remain bound; because, their engagement being joint, if one is discharged by the act or default of the appellant, it operates to discharge the other also. This principle is well settled: See the cases before cited; also *Yates v. Donaldson*, 5 Md. 389 [61 Am. Dec. 283].

Judgment affirmed.

DEMAND UPON NOTE PAYABLE AT BANK or designated place: See *Allen v. Merchants' Bank*, 34 Am. Dec. 239, note 306; *Bank v. Hollister*, 72 Id. 416, note 419.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

WATERS v. STICKNEY.

[12 ALLEN, 1.]

DECREES OF PROBATE COURTS, within the authority conferred upon them by law, are conclusive upon the courts of common law, and cannot be reversed by writ of error or *certiorari*; nor can they be set aside in equity even for fraud; but they may be revoked or repealed for good cause, as for fraud or mistake, by the court which granted them.

PROBATE COURTS MAY ADMIT TO PROBATE CODICIL OF WILL which it has already admitted to probate, though the codicil is written upon the back of the same leaf upon which the will is written, and even after the time for appealing from the decree has passed, if such codicil escaped attention, and was not passed on at the time of the probate of the original will.

APPEAL from an order admitting to probate the codicil to the will of one John Waters. Waters died in June, 1851, and his will was within the same month admitted to probate. In 1865, after the death of the testator's widow, the executor presented for probate the codicil to the testator's will, which had been written on the back thereof, and inadvertently omitted in the probate. Both will and codicil were regularly executed and attested. The lower court admitted the codicil to probate.

D. Roberts, for the appellant.

G. Wheatland, for the appellee.

By Court, GRAY, J. The decision of this case involves an interesting question of the extent of the powers of courts of probate, upon which there has been no express adjudication in

this commonwealth, but to which a consideration of the precedents and authorities on the subject furnishes a satisfactory answer.

The jurisdiction over the probate of wills and granting administrations is peculiar. It was derived from the civil law through the ecclesiastical courts of England, and was granted by the province charter to the governor and council, who appointed judges of probate in the different counties as their delegates, from whom an appeal lay to them; and this appellate power was continued in the governor and council after the establishment of the state constitution until the end of the Revolution, when it was transferred to this court, still, however, keeping the probate jurisdiction distinct from those of common law and equity: *Anc. Chart.* 32; *Governor Pownall's Message to his Council in 1760*, Quincy, 573; *Constitution of Massachusetts*, c. 3, sec. 5; *Stats.* 1783, c. 46; *Peters v. Peters*, 8 Cush. 540-542. The jurisdiction of courts of probate in Massachusetts, differing in this respect from those of England and of some other states, includes wills of real estate as well as of personal property: *Anc. Chart.* 32; *Laughton v. Atkins*, 1 Pick. 549, and cases cited; *R. S.*, c. 62, sec. 32, and commissioners' note; *Gen. Stats.*, c. 92, sec. 38.

Decrees of probate courts in matters of probate, within the authority conferred upon them by law, are conclusive upon the courts of common law, and cannot be reversed by writ of error or *certiorari*: *Dublin v. Chadbourn*, 16 Mass. 441; *Smith v. Rice*, 11 Id. 513; *Peters v. Peters*, 8 Cush. 529. Nor can they be set aside in equity even for fraud: *Kerrich v. Bransby*, 7 Brown Parl. C., 2d ed., 437; *S. C.*, *sub. nom. Herridge v. Bransby*, 2 Lec, 563; *Barnesly v. Powel*, 1 Ves. Sr. 287; *Allen v. Macpherson*, 1 Phillips, 145, 146; *S. C.*, 1 H. L. Cas. 211, 220, 221, 225, 231, 234; *Gaines v. Chew*, 2 How. 641, 645, 646; *Sever v. Russell*, 4 Cush. 513 [1 Am. Dec. 811]. But the very authorities cited for the appellant to show the conclusiveness of an existing probate state that it may be repealed by the court which granted it: *Noell v. Wells*, 1 Lev. 235; *S. C.*, 1 Sid. 359; *Allen v. Dundas*, 3 Term Rep. 125; 2 Smith's Lead. Cas., 5th ed., 446.

By the practice of the English ecclesiastical courts, a will may be proved either in common form, *ex parte*, upon being presented by the executor, or in solemn form after notice to all parties interested,—which last accords with our practice in all cases of probate of wills. When a will is proved in common

form, the court may, upon the subsequent application of any party interested, and notice to the executor, at any time within thirty years, order that will, or a later one, if produced, to be proved in solemn form: 1 Williams on Executors, 5th Am. ed., 282, 300, 508; *Case of Executors*, Het. 77; *Ridgway v. Abington*, 3 Swab. & T. 3. And probate of a will granted upon the mistaken supposition that the testator is dead may be revoked and canceled by the court which granted it: *Goods of Napier*, 1 Phillim. 83.

Even when a will is proved in solemn form, it is within the jurisdiction of the court, for sufficient cause shown, to revoke the probate. The English authorities recognize as sufficient causes of revocation, forgery of the will, fraud in obtaining probate, neglect or mismanagement in conducting the suit, or the production of a later will.

The courts of common law formerly went so far as to hold that the forgery of a will which had been admitted to probate could not be made the ground of an indictment until the probate had been revoked; but according to later and sounder decisions, the probate, though conclusive until set aside of the disposition of the property, does not protect the forger from punishment: *Rex v. Vincent*, 1 Strange, 481; *Ramsbottom's Case*, 1 Leach, 4th ed., 25, note; *Rex v. Buttery*, Russ. & R. C. C. 342; *Rex v. Gibson*, Id. 343, note.

In *Barnesly v. Powel*, 1 Ves. Sr. 254, a will of personalty, which had been proved in the ecclesiastical court (evidently in solemn form, for it is said in the report that the time for appeal had lapsed, whereas if it had been proved in common form only, the party could, as we have already seen, have had relief by citing in the executor, without being put to his appeal), was shown to have been forged; and Lord Hardwicke decreed that the party should consent to a revocation of the probate and letters testamentary, so as to enable the ecclesiastical court to cause them "to be duly revoked according to the course of that court": S. C., Belt's Supp. 150. The custom and right of that court to revoke any of its decrees obtained by fraud or surprise are also recognized in *Harrison v. Mitchell*, Fitz-G. 303; S. C., *sub nom. Harrison v. Weldon*, 2 Strange, 911; and in *Nicol v. Askeu*, 2 Moore P. C. C. 92.

In a proceeding in the ecclesiastical court by the daughter of a deceased person, after citation to an executor named in a will of his, for letters of administration with that will annexed, in the event of the executor's declining to take probate, attor-

neys intervened in behalf of the executrix named in a later will, then residing abroad, propounded this will, and prayed letters of administration with this will annexed to be granted to them in her behalf; but afterwards withdrew from the suit, and letters of administration with the first will annexed were thereupon decreed to the daughter. Upon evidence that the attorneys withdrew from that suit for want of funds and defect in their power of attorney, and because the daughter's husband assured them that he could prove the later will to be a forgery, Sir John Nicholl held that the executrix named in the second will, and *a fortiori* any other party interested under it, was not barred from repropounding it, and said: "It must be remembered that there has still been no sentence, either for or against the validity of either will; and although in ordinary cases when the parties being present declare that they proceed no further, or duly authorize a practitioner to take that step for them, the court, as far as it legally can, will hold them bound; yet it would be unjust and inequitable not to make great allowance in this respect for a case circumstanced as the present is": *Trower v. Cox*, 1 Add. Ecc. 219. And in *Hayle v. Hasted*, 1 Curt. Ecc. 240, Sir Herbert Jenner stated the rule to be that parties whose interests were affected by a will previously proved in solemn form might call in the probate and require the will to be repropounded, upon showing "that there has been fraud or collusion practiced to their prejudice, or that there has been neglect or mismanagement in the conduct of the suit."

In *Wilkinson v. Robinson*, 14 Jur. 72, the same judge decreed probate of a later will notwithstanding an earlier will had already been admitted to probate and the executrix named therein was out of the jurisdiction and could not be cited. All the text-books most relied on as guides in matters of practice of this kind state that probate of a will, either in common or solemn form, may be revoked on evidence of fraud in the proof, or of a later will: Wentw. Off. Ex. 48; Toller, 73, 74; 1 Williams on Executors, 399, 508.

In the analogous case of letters of administration, it is now well settled in England, and in many of the United States, that they may be revoked for sufficient cause by the court which granted them: 1 Williams on Executors, 509-512, 521, 524, and notes. The English court of common pleas recently refused to stay an action at law by an administrator appointed by the ecclesiastical court on affidavits that the deceased had left a will appointing an executor; Mr. Justice Williams say-

ing: "Where letters of administration have been improperly obtained or improvidently granted, the proper and only course is to go to the ecclesiastical court to get them revoked": *Prosser v. Wagner*, 1 Com. B., N. S., 295.

Beside the opportunity of obtaining revocation of a decree of the ecclesiastical court in certain cases, the law of England gave a right of appeal in every case; and after a decision in the highest court, the king, in the discretionary exercise of his prerogative, upon the advice of the chancellor, might grant a commission of review: 1 Williams on Executors, 493 et seq.; *Matthews v. Warner*, 4 Ves. 186-211, and notes; S. C., 5 Ves. 23. But the present existence here of such a discretionary power, either in the executive or the legislature (though not unlike that of granting new trials and reviews in actions at law, which was freely exercised by the general court of the province when unrestrained by any written constitution), is irreconcilable with the separation of the executive, legislative, and judicial departments by the constitution of the commonwealth: *Merrill v. Sherburne*, 1 N. H. 199 [42 Am. Dec. 52]; *Lewis v. Webb*, 3 Greenl. 326; *Holden v. James*, 11 Mass. 396 [6 Am. Dec. 174]; *Denny v. Mattoon*, 2 Allen, 378, 379 [79 Am. Dec. 784], and other cases there cited.

The records of the governor and council, sitting in a judicial capacity as the supreme court of probate of the province, throw much light upon the practical construction of the extent of the power of revocation incidental to the probate jurisdiction, and show that such a power was frequently exercised in cases of fraud or mistake, whether in every instance wisely we need not inquire. A few examples, out of many which might be selected, will afford sufficient evidence that the power was adopted, used, and approved in the province, and usually practiced on in the courts of law, and therefore continued to exist after the adoption of the constitution, unless modified or taken away by the legislature: Constitution of Massachusetts, c. 6, art. 6.

In 1705, upon a hearing before the governor and council of "a challenge made" on behalf of Anthony Penn to an instrument which had been admitted to probate in the county court of Suffolk in 1688-89 as the will of his uncle, William Penn, of Braintree, the question was put "whether there do appear in the law a forgery or perjury to void the will," and resolved in the negative. But upon a new petition in 1716 by the same nephew and by a niece of the testator, alleging that after the

probate it was declared by one of the subscribing witnesses to the will that it was forged and contrived after the testator's decease by the person who presented it for probate, the governor and council, after notice and hearing, made a final decree declaring the will null and void: Council Rec. 1705, fol. 176; 1716, fols. 465, 466, 477.

In 1725, Judge Samuel Sewall (then chief justice of the province), as judge of probate in Suffolk, revoked letters of administration which he had previously granted on the estate of Benjamin Bates to his son of the same name, and granted letters of administration *de bonis non* to Stephen Boutineau. In "an action of trespass and ejectment," brought by Boutineau to recover land of his intestate, the defendants claimed title under a sale by the first administrator by license of court; the jury, upon a trial in the superior court of judicature, returned a special verdict that "if the judge of probate had power to revoke the former letters of administration granted to Benjamin Bates, and to grant letters of administration *de bonis non*, etc., to the plaintiff," then they found for the plaintiff, otherwise for the defendant. And the court gave judgment for the defendant. Boutineau then presented a petition to the governor and council, representing that by that judgment his administration was disallowed, and the power of the judge of probate to revoke the former letters of administration and grant new ones in effect denied; and praying that his letters of administration might be confirmed or he be otherwise relieved; upon which the governor and council, after notice and hearing, resolved that the letters granted to him were "good, valid, and effectual in the law." He then applied to the general court for a review of his action at law, which, after notice and hearing, was granted, and another trial was had in the superior court of judicature, resulting in a verdict for him, upon which judgment was rendered: *Boutineau v. Billings*, Rec. 1726, fols. 71, 72; Council Rec. 1725-1726, fols. 348, 349, 355; 13 General Court Rec. 145, 184.

In 1757, a division of the estate of Phinehas Adams among his heirs by commissioners appointed by Judge Hutchinson as judge of probate was returned to the probate court of Suffolk County; but the fees thereon not being paid, the usual form of acceptance was not written upon it by the register, nor signed by the judge, nor the return recorded, but it was filed with other papers, and forgotten. The parties, supposing the return to be accepted in form, entered upon, improved, and

made conveyances of the parts respectively assigned to them. In 1762, Judge Hutchinson (who was then also lieutenant-governor and chief justice of the province, as well as judge of probate for Suffolk) discovered the mistake, and after notice and hearing, entered and signed an acceptance of the return *nunc pro tunc*, and submitted the question of the validity of this acceptance, with other questions in the case, to the supreme court of probate, who do not appear by the record to have directly affirmed it (as they did the return upon the main question submitted to them), but certainly did not disapprove it, for the records of the inferior court of probate show that the estate was afterwards settled there according to this division: Supr. Prob. Rec. 1762, fols. 22-24; Suffolk Prob. Rec. 1763, lib. 61, fols. 199, 200; 1764, lib. 63, fol. 67.

In a subsequent case, both of the executors named in the will of William Brown, Jr., died after accepting the trust, the survivor having appointed Joseph Sherburne his executor. Yet the judge of probate in Essex appointed John Brown administrator *de bonis non* with the will annexed of William. Sherburne appealed to the supreme court of probate, who, in 1766, after argument by counsel, and against the opinion, though with the final concurrence, of Governor Bernard (who had himself been a deputy registrar of one of the ecclesiastical courts in England), decreed that the administration be granted to Sherburne, and that upon his giving bond to the supreme court of probate for the performance of his trust, and taking out letters of administration, the decree of the judge of probate be reversed, and the letters granted by him revoked. Sherburne, by writing filed in the supreme court of probate, declared himself ready to give such a bond, but apparently never gave one. Upon a new petition filed by Sherburne in 1771, after Judge Hutchinson had become governor, the supreme court of probate, after notice to John Brown, ordered its own decree to be set aside, and the decree of the judge of probate reversed unconditionally, upon the ground that the petitioner, as executor of the surviving executor, was by law executor of the first testator: Supr. Prob. Rec. 1766-1771, fols. 46-48, 80, 81, and papers on file. That rule of the common law was abolished here after the Revolution: Stats. 1783, c. 24, sec. 19; R. S., c. 63, sec. 10; Gen. Stats., c. 93, sec. 9.

The authority of the probate court to revoke its own decrees is expressly recognized and declared by the statutes of the commonwealth in some cases. By Stats. 1817, c. 190, re-

enacted in the R. S., c. 64, sec. 16, and Gen. Stats., c. 94, sec. 5, if after the grant of letters of administration as of an intestate estate a will is duly proved and allowed, the first administration shall be revoked. This accords with the practice of the ecclesiastical courts in England both before and since our Revolution: *Carolus v. Lynch*, 1 Lee, 13; *Baker v. Russell*, 1 Id. 167; *Prosser v. Wagner*, 1 Com. B., N. S., 295. By the R. S., c. 83, sec. 31, re-enacted in the Gen. Stats., c. 117, sec. 24, any warrant or commission for the appraisement of an estate, for examining the claims on an insolvent estate, for the partition of real estate, or for the assignment of dower, may be revoked by the judge of probate for any sufficient cause. This section was proposed by the commissioners on the R. S., as they state in their report, "only to prevent doubt, as it is supposed that the judge of probate already possesses the power here granted": Note of Commissioners to R. S., c. 83, sec. 29. And the existence of such a power was recognized by the supreme court of the United States in *Thompson v. Tolmie*, 2 Pet. 163.

In *Clark v. Wright*, 3 Pick. 67, in which a will alone had been admitted to probate in the court below, from which a codicil had been fraudulently torn off, Chief Justice Parker said: "The court have no doubt that the codicil may and ought to be proved. It will be for the party claiming under it to consider whether he will make application here or before the judge of probate to have it allowed." As that case arose on appeal from the original probate, the codicil was allowed upon petition to this court in the same cause, so that it became unnecessary to consider the extent of the power of the probate court upon a new application. The final decree indeed affirmed the decree below which had admitted the will to probate, and then proceeded to declare the codicil also proved: *Clark v. Wright*, 3 Pick. 69, note; but probate decrees usually allow a will and codicil as distinct instruments, and the fact of their being such may affect their construction: See *Weddall v. Nixon*, 17 Beav. 166; *Goods of Greig*, L. R. 1 Pro. & D. 72; *Baillie v. Butterfield*, 1 Cox, 392. In *Newman v. Jenkins*, 10 Pick. 516, this court said: "So long as the letters of administration stand unrecalled, they are evidence of the death." In *Emery v. Hildreth*, 2 Gray, 231, 232, Mr. Justice Thomas said that the validity of a decree of the probate court appointing an administrator, if objected to by one of the parties entitled to administration, on the ground that he had no no-

tice, "could be tried only in the probate court, or in this court sitting as the supreme court of probate."

In *Stetson v. Bass*, 9 Pick. 30, Mr. Justice Wilde, delivering the opinion of the court, said: "We think there can be no doubt of the right and authority of a judge of probate to open an account settled for the purpose of correcting a manifest mistake. In the proceedings of all courts errors and mistakes will occur, and frequently without the fault of either party, and justice requires that some method should be provided for the correction of such errors and mistakes, in whatever court they may occur. In courts of common-law jurisdiction the remedy is by writ of error, motion for new trial, or application for a writ of review; but these remedies are not applicable to the proceedings of a court of probate. In that court, when a mistake is made in the settlement of an account, the course is to apply to the judge of probate for the correction of the mistake, by petition, or to state the amount claimed in a new account, unless when the mistake is discovered the party has a right of appeal by which it may be corrected in this court. This practice seems to be well settled, and in several cases has received the sanction of this court. It is indeed essentially necessary for the furtherance of justice, and ought not to be too strictly limited." The authority of courts of probate to correct errors in their decrees on administration accounts, even when in terms final, upon clear proof of fraud or mistake in a point not once actually presented and passed upon, has been repeatedly sustained by this court, and by the highest courts of Vermont and New York, and is now affirmed in this state by statute: *Field v. Hitchcock*, 14 Pick. 405 [28 Am. Dec. 288]; *Boynton v. Dyer*, 18 Pick. 5; *Adams v. Adams*, 21 Vt. 166, 167, and cases cited; *Pew v. Hastings*, 1 Barb. Ch. 452; *Sipperly v. Baucus*, 24 N. Y. 46; R. S., c. 67, sec. 10; Gen. Stats., c. 98, sec. 12. A court of probate has no more power by a decree establishing one testamentary instrument to preclude the subsequent probate of a later one never before brought to its notice than by a decree approving one account to discharge an administrator from responsibility for assets not actually accounted for.

In none of the judgments of this court to which the appellant has referred was it necessary to pass upon the power of the court of probate to revoke or correct its own decrees.

The decision and opinion in *Peters v. Peters*, 8 Cush. 529, were limited to the question of the appellate powers of this

court, either as a court of probate or as a court of common law, in probate matters. In the very passage cited for the appellant, Chief Justice Shaw limited his statement accordingly, saying: "We believe that when the legislature vested this jurisdiction in judges of probate, and created a supreme court of probate with a full appellate jurisdiction, allowing an appeal within a short limited time, with a power in this court to enlarge that time in case of accident or mistake, they did all they intended to do in providing for the revision of decrees in probate matters by appeal": *Id.* 542, 543. The chief justice had already said at the outset of his elaborate discussion of that question: "It may be proper to premise that the peculiar and appropriate jurisdiction of the probate courts in this commonwealth, embracing the probate of wills, granting administrations, and their incidents, is precisely that which was and still is exercised by the ecclesiastical courts of Great Britain": *Id.* 536.

In *Dublin v. Chadbourn*, 16 Mass. 433, the only point decided was, that the decree of a probate court upon the probate of a will was conclusive in an action at law. The case of *Crippen v. Dexter*, 13 Gray, 330, involved only the conclusiveness of the decree of a probate court of another state upon the validity of a will on a subsequent application to prove the will in this state; and the mention of the importance of making proof of a will once for all and for all purposes, inasmuch as it determines the condition of a deceased person's estate, and whether it must be settled as an estate testate or intestate,—though showing strong ground for holding the probate of a will in one court to be conclusive upon all property, real as well as personal, everywhere,—cannot be held to imply that errors in that probate, arising out of mistake or fraud, are beyond all remedy in the same court. There is no reason why the probate of a will which does not express the last intentions of the testator should be held irrevocable more than letters of administration issued upon the supposition that the deceased died intestate; and it has been directly adjudged by this court that a will may be proved even thirty years after the death of the testator, although original administration could not by statute be granted after twenty years: *Bourne v. Greenleaf*, Essex, 1802; S. C. cited 1 Pick. 117, note 2; 3 Dane Abr. 452; *Shumway v. Holbrook*, 1 Pick. 117 [11 Am. Dec. 153]; *Marcy v. Marcy*, 6 Met. 370; Stats. 1783, c. 36, sec. 10; R. S., c. 64, sec. 13.

The cases of *White v. Clapp*, 8 Met. 365, and *Jenks v. Howland*, 3 Gray, 536, touched only the point that decrees of the probate court in the partition of real estate, of which it had jurisdiction by statute, but in which it had exceeded its powers, might be treated as void, and no bar to a writ of entry or a new petition for partition. In *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87, the grant of administration on the estate of a living person was held to be beyond the jurisdiction of the probate court, and not binding on him in an action at law, as was fully demonstrated on principle and authority; and the statement on page 95, that the only opportunity for revising or modifying a decree of the court of probate was by appeal within thirty days, or petition to this court for leave to appeal within one year, was not necessary to the decision.

The *dictum* of Chief Justice Marshall in *Griffith v. Frazier*, 8 Cranch, 25, that "letters testamentary, when once granted, are not revocable by the ordinary," must be applied to the case before him, in which the only ground alleged for the appointment by the ordinary in South Carolina of an administrator *de bonis non* was the executor's absence from the state, which had been held by the highest court of that state to be no sufficient ground for revoking the letters testamentary; and if understood as laying down a universal rule, is inconsistent with subsequent judgments of the supreme court of the United States, recognizing the power of a court of probate to revoke the probate of a will, or admit a later will to probate, which, by reason of fraud or otherwise, had not been brought to its knowledge at the time of approving the earlier will: *Gaines v. Chew*, 2 How. 641, 646; *Gaines v. Hennen*, 24 Id. 567.

The authority of courts of probate in this respect has been fully sustained in the courts of many states. In *Bowen v. Johnson*, 5 R. I. 119, 120 [73 Am. Dec. 49], the supreme court of Rhode Island held that the power to revoke a probate once granted, although nowhere expressly recognized in the statutes of that state, was a just and necessary power to be implied from the statute conferring general authority to "take the probate of wills and grant administration on the estates of deceased persons," and might be exercised incidentally to an application for the probate of a later will. In *Muir v. Trustees of Orphan House*, 3 Barb. Ch. 481, Chancellor Walworth, exercising an appellate probate jurisdiction, said: "The probate of a will of personal property, whether such probate

was obtained by a summary or a plenary proceeding, if granted by the proper testamentary court, is conclusive evidence of the due execution of such will, until such probate has been called in or annulled by such court, or has been reversed on appeal to the proper tribunal"; thus recognizing the power of the surrogate to call in or annul the probate, notwithstanding that, by the statutes of that state (as by our own), every will was proved in solemn form, after citation to all parties interested; and that the next of kin, if they had not appeared and contested the will upon the probate thereof, might come in and do so within one year. The decree of the judge of probate in the case before us is very like one passed by Mr. Surrogate Bradford in the corresponding court for the county of New York, in *Campbell v. Logan*, 2 Bradf. 90, allowing a codicil to be presented for probate, after the will had been established and allowed on a previous day, and upon due proof, to be admitted to probate as together with the will constituting the last will and testament of the deceased. The courts of appeals of Maryland and Virginia have held that, notwithstanding any lapse of time after the probate of a will, a later will of the same testator might be admitted to probate by the court which granted the first probate: *Clagett v. Hawkins*, 11 Md. 381; *Schultz v. Schultz*, 10 Gratt. 358 [60 Am. Dec. 335]. The supreme court of North Carolina has held that letters testamentary issued to two executors named in a will, one of whom was made sole executor by a codicil, might be revoked as to the other by the county court of probate of its own motion at a subsequent term: *County Court of Mecklenburg v. Bissell*, 2 Jones, 389. And in New Jersey and Alabama it has been held that a probate granted without notice might be vacated by the court on the application of a party entitled to notice: *Lawrence's Will*, 7 N. J. Eq. 215; *Roy v. Segrist*, 19 Ala. 810.

In the face of these authorities, it is impossible to deny the power of a court of probate to approve a subsequent will or codicil after admitting to probate an earlier will by a decree the time of appealing from which is past; or to correct errors arising out of fraud or mistake in its own decrees. This power does not make the decree of a court of probate less conclusive in any other court, or in any way impair the probate jurisdiction; but renders that jurisdiction more complete and effectual, and by enabling a court of probate to correct mistakes and supply defects in its own decrees, better entitles

them to be deemed conclusive upon other courts. There is no reason to apprehend that such a power may be unjustly exercised. It is vested in the same court which is intrusted with the original jurisdiction over all probates and administrations. No decree admitting a later instrument to probate, or modifying or revoking a probate already granted, can be made without notice to all parties interested; every party aggrieved by the action of the probate court has the right of appeal to this court; and an application of this nature, when one will has already been proved, would never be granted except upon the clearest evidence. The new decree would not necessarily avoid payments made or acts done under the old decree while it remained unrevoked: *Allen v. Dundas*, 3 Term Rep. 125; *Appeal of Peebles*, 15 Serg. & R. 39; *Kittredge v. Folsom*, 8 N. H. 98; *Stone v. Peasley*, 28 Vt. 720; 1 Williams on Executors, 520, 522.

The report now before us presents no question upon the extent of the operation of such a new decree passed after the estate has been conveyed or improved; and shows a proper case for the exercise of the power.

The will and codicil were both executed, and attested according to law. No fraud is shown in either party. Nor can it be said that either has been guilty of such want of diligence as should forfeit any rights which that party has or represents. The executor may well have been misled by the letters testamentary issued to him under the seal of the probate court, annexed to which was a copy of the codicil as well as of the will; and until the death of the widow and tenant for life, there was no difference between the will and the codicil in the disposition of the estate. On the other hand, the descendants entitled in remainder under the will would naturally rely upon the record of the probate court, on which the codicil did not appear. That record (as well as the facts proved at the hearing, which would hardly be admissible if they contradicted it) shows that the codicil was not brought to the notice of the judge of probate when he approved the will. The mistake may have been occasioned by inattention or oversight of the counsel or the testifying witness, or possibly of the judge; but the delay in discovering it is fairly attributable to the carelessness of the register in annexing a copy of the unproved codicil to the letters testamentary.

This mistake cannot be corrected by any proceeding at common law or in equity. The time for appealing from the

first decree approving the will is long since past. This court has no original probate jurisdiction, and in the exercise of its appellate jurisdiction from the probate court can only make such decrees as that court should have made: Gen. Stats., c. 117, secs. 7, 8, 16; *Grinnell v. Baxter*, 17 Pick. 383. Unless, therefore, the last decree of the judge of probate, approving the codicil, can be sustained, the parties claiming under the codicil are without remedy.

If the codicil had been on a separate paper, not known to the parties at the time of the probate of the will, but now recently discovered, there could be no doubt of the power and the duty of the probate court to admit it to probate. The fact that it is on the same paper does not change the reason of the thing, as it has never in fact been passed upon by the judge of probate.

The lapse of time since the death of the testator and the probate of the will should lead the court closely to scrutinize the evidence offered, but is no positive bar. If no will had yet been proved, the lapse of time would not prevent both will and codicil from being proved now. The fact that a will has been already proved affords no reason for imposing stricter limitations upon the proof of a codicil, whether the omission to prove it sooner has been occasioned by ignorance of its existence, by fraudulent suppression of it, or by an innocent but mistaken belief that it has been already proved. It would be peculiarly unjust to make any difference in this case on account of the former probate of the will, inasmuch as that will gave the testator's children after the death of his widow the same interest in the land which they would have had if he had died intestate, and they would therefore, according to a familiar rule of law, take the estate as his heirs, and not by virtue of the will: *Ellis v. Page*, 7 Cush. 161; *Sedgwick v. Minot*, 6 Allen, 171.

We are therefore satisfied that the decree of the judge of probate now appealed from is correct in principle and according to precedent. But as the case involves an important question of law, upon which the appellant might reasonably desire the opinion of this court as the supreme court of probate, the common rule in probate causes must be followed, and no costs allowed to either party: *Osgood v. Breed*, 12 Mass. 536; *Woodbury v. Obear*, 7 Gray, 472.

Decree affirmed.

POWER OF COURTS OF PROBATE TO REVOKE PROBATE OF WILLS, OR PROBATE ADDITIONAL WILL OR CODICIL. — The determination of this question necessitates, to a certain extent, an examination of the general powers and jurisdiction of courts of probate. These courts are often spoken of as courts of inferior jurisdiction; but in the sense in which the term "inferior" is generally used, the statement is inaccurate: *Peters v. Peters*, 8 Cush. 529; *Stearns v. Wright*, 51 N. H. 609. They are in reality courts of a limited but not inferior jurisdiction, having general powers, though only over a particular class of cases: *Propet v. Meadows*, 13 Ill. 157; *Adams v. Adams*, 22 Vt. 50. The subjects to which their jurisdiction extends is generally prescribed by statute. Over these matters, however, they have general and plenary powers. Their jurisdiction is not limited to granting or refusing the precise relief asked, but, acting within their jurisdiction, they may grant any relief consistent with the facts proved or admitted, and which the justice of the case demands: *Tryon v. Farnsworth*, 30 Wis. 577; *Brook v. Chappel*, 34 Id. 405. They are also, generally, courts of record. It appearing, therefore, that they are courts of general jurisdiction as to the matters over which they have power, it follows that their decrees as to such matters are as final and conclusive as the judgments of any other court: *Freeman on Judgments*, sec. 319 a, and cases cited in note 1; *Polter v. Webb*, 2 Me. 257; *Ostrom v. Curtis*, 1 Cush. 460; *Cummings v. Cummings*, 128 Mass. 271; *Dayton v. Minter*, 22 Minn. 393; *Tibbitts v. Tilton*, 24 N. H. 124; *Barker v. Barker*, 14 Wis. 131; and not subject to collateral attack: *Dayton v. Minter*, 22 Minn. 393; *Morrel v. Lawrence*, 23 Id. 84. Such decrees cannot be reversed by courts of common law upon writ of error or certiorari: *Dublin v. Chadowan*, 16 Mass. 441; *Smith v. Rice*, 11 Id. 513; *Peters v. Peters*, 8 Cush. 529; nor can they be set aside in equity even for fraud: *Freeman on Judgments*, sec. 608; *Kerrick v. Bransby*, 7 Brown Parl. C. 437; *Allen v. McPherson*, 1 Phillip. 146; *Gaines v. Chew*, 2 How. 641; *Broderick's Will*, 21 Wall. 503; *Tompkins v. Tompkins*, 1 Story, 547; *California v. McGlynn*, 20 Cal. 235; *Sever v. Russell*, 4 Cush. 513; *Holden v. Meadows*, 31 Wis. 284; *Archer v. Meadows*, 33 Id. 166; But it likewise follows, as in the case of decrees of other courts of general jurisdiction, that probate courts have power in furtherance of justice to revoke or set aside their own order, in a direct proceeding therefor, for fraud or irregularity: *Bronson v. Pinney*, 2 Pinn. 185; *In re Fisher*, 15 Wis. 567. But this power does not extend to cases where the effect of a revocation of the decree would be to avoid the operation of statute of limitations: *Betts v. Shotten*, 27 Id. 667; or to impair vested rights acquired under them: *State v. Ramsey County*, 19 Minn. 117.

Whether the power of probate courts to revoke or set aside their own decrees applies to the revocation of the probate of a will is one of the questions which it is the object of this note to determine. That such power does exist seems to be settled both by the authorities and by general reasoning. To what extent that power goes, we shall see. But first it may be stated that in most of the United States the statutes have provided that the probate of a will shall be conclusive, and not subject to attack after a specified number of years, except by minors when they come of age, and sometimes for fraud.

Revocation for Fraud. — That a court of probate, in the absence of statute, has power to set aside its own decree admitting a will to probate on the ground of fraud or mistake seems to be settled by the authorities: *Prosser v. Wayner*, 1 Com. B., N. S., 295; *Broderick's Will*, 21 Wall. 509; *Allen v. Dudas*, 3 Term Rep. 121; *Gaines v. Chew*, 2 How. 641; *Gaines v. Heman*, 24

Id. 567; *Olgett v. Hawkins*, 11 Md. 381; *Morgan v. Dodge*, 44 N. H. 258; *Campbell v. Logan*, 2 Bradf. 90; *In re Paige*, 62 Barb. 476; *Bowen v. Johnson*, 5 R. I. 119; *Peebles's Appeal*, 15 Serg. & R. 39. In Wisconsin, the matter was considered to be in doubt: *Archer v. Meadows*, 33 Wis. 166; but the court said that if the power did not exist in the probate court, and courts of equity declined to set aside the probate of a will for fraud, there might be a gross fraud without a remedy. Courts of equity, as already stated, have constantly refused to entertain bills for relief against wills and probate obtained by fraud, always assuming that there is an ample remedy in the power of courts of probate: *Broderick's Will*, 21 Wall. 503; *In re Paige*, 62 Barb. 476; *Campbell v. Logan*, 2 Bradf. 90; *Tompkins v. Tompkins*, 1 Story, 547; *California v. McGlynn*, 20 Cal. 235; *Holden v. Meadows*, 31 Wis. 284; *Archer v. Meadows*, 33 Id. 166. It is otherwise, however, in some of the states by statute. In the principal case, speaking of the power to revoke probate of a will for fraud, even after the time for appeal has past, it is said that "the power does not make the decree less conclusive in any other court, or in any way impair the probate jurisdiction, but renders that jurisdiction more complete and effectual, and by enabling a court of probate to correct mistakes and supply defects in its own decrees, better entitles them to be deemed conclusive upon other courts."

The jurisdiction to revoke for fraud in the absence of statute is equitable in its nature, and should be exercised only in the same cases and on the same principles as govern equity courts. A party guilty of laches will be concluded by the probate: *Holden v. Meadows*, 31 Wis. 284; and the same negligence that would bar a remedy in a court of equity upon the ground of fraud or mistake would do so in a court of probate: *Broderick's Will*, 21 Wall. 509; *Worthington v. Gittings*, 56 Md. 542.

Another Will or Codicil. — While probate of a will cannot be collaterally avoided on the ground that the testator made a subsequent will and appointed another executor, *Moore v. Tanner's Ex'r*, 5 Mon. 42, there is no doubt that when a later will is discovered, the probate of the former will may be revoked, and the later one probated, and this though the first probate was in solemn form (in those states where that form is provided for): *Wilkinson v. Robinson*, 14 Jur. 72; *Williams on Executors*, 6th Am. ed., 576; *Campbell v. Logan*, 2 Bradf. 90; 3 Redfield on Wills, 3d ed., 120. It is held, however, in such cases that the acts of the executor under the first will are valid while it remains in force: *Bigelow v. Bigelow*, 4 Ohio, 138; *Kittredge v. Folsom*, 8 N. H. 98; *Price v. Nesbit*, 1 Hill Ch. 445; and see *Wooley v. Clarke*, 5 Barn. & Ald. 744. In *Patton's Appeal*, 31 Pa. St. 465, it is said that the first executor must in such cases be regarded as administrator *pendente lite*.

Offering a codicil after the probate of a former will is said to be, in effect, an offer for probate of a later will; and where (as by statute in some states) the validity and status of a will cannot be contested after a certain period, it is held that the offer for probate of a codicil amounts to a contest of the will or probate, and must be made within the prescribed time: *Adsit's Estate*, Myrick Prob. Rep. (Cal.) 266.

The principal case seems to settle the principle that where a codicil was overlooked by mistake, it might subsequently be offered for probate.

In *Wells v. Stearns*, 35 Hun, 323, it was held that it cannot be contended many years after probate of a will that a provision affecting land was inoperative because written below the subscription, it having been probated as part of the will.

In *Goods of Harris*, 18 Week. Rep. 901, the testator made two wills, one

of his property in England, and the other of property in Tasmania. The first was probated in England. The latter was refused probate in Tasmania, on the ground that a man could only have one will; that therefore as the former, as decedent's will, had already been probated, the latter could not be probated as his will. The English court then revoked probate of the former will, and probated both of them as decedent's will.

If Testator, Supposed to be Dead, afterwards appears alive, the probate should be set aside: *Goods of Napier*, 1 Phillim. 83. The contrary is held in a late case in New York: *Roderigas v. East River Sav. Bank*, 63 N. Y. 460; S. C., 20 Am. Rep. 555; but this is the only case in which this ruling is found. There are a large number of cases in opposition to the position taken in this case by the New York court; and it seems that they must necessarily be good law, for the reason (apart from the fact that they constitute the weight of authority) that the decease of the decedent is the first prerequisite to the jurisdiction of probate courts: *Melia v. Simmons*, 45 Wis. 334; S. C., 30 Am. Rep. 746; *Allen v. Dundas*, 3 Term Rep. 125; *Duncan v. Stewart*, 25 Ala. 408; *Wales v. Willard*, 2 Mass. 120; *Jochumson v. Suffolk Sav. Bank*, 3 Allen, 87; *Morgan v. Dodge*, 44 N. H. 259; *Bolton v. Jacks*, 6 Rob. 166; *McPherson v. Cunniff*, 11 Serg. & R. 422; S. C., 14 Am. Dec. 642; *Peebles's Appeal*, 15 Serg. & R. 42.

KELLY v. DREW.

[12 ALLEN, 107.]

WOMAN IS INCOMPETENT AS WITNESS AGAINST MAN TO WHOM SHE WAS MARRIED four years after separation from her first husband, from whom she had heard nothing for sixteen years since the second marriage. The presumption of the wife's innocence in marrying again will overcome any presumption that a man not heard from for four years before her second marriage and sixteen years afterwards was alive and her lawful husband when she married the second time.

WHERE MARRIED WOMAN BOUGHT ARTICLES FOR FAMILY USE from time to time, paying for them partly with her own earnings and partly with money furnished by her husband, and not discriminating or separating part of the property as her own from the rest, and there being nothing in the articles themselves to indicate that they were for her personal and exclusive use, it would be *prima facie* evidence that she did not claim or have any separate title or exclusive right in any portion of them.

REFLEVIN for certain furniture, by plaintiff, the mother of defendant's wife. Plaintiff showed that the property had been purchased by her and her daughter, with money earned by them, and had been brought by them to defendant's house. Plaintiff claimed that it had been agreed between herself and her daughter that the property was to belong to plaintiff, unless defendant repaid the money paid for it, and another sum advanced to enable him to purchase the land upon which they lived. Plaintiff alleged that of several hundred dollars paid for the furniture and property only ten dollars had been re-

paid. Plaintiff then offered to call her daughter (who had been separated from defendant for four years) as a witness, claiming her right to do so on the fact that the marriage with plaintiff was void, a former marriage with one Hall being still in existence. The remaining facts on this point appear in the opinion. The judge refused to receive the daughter as a witness. On the question whether the plaintiff's said daughter had any separate and assignable title or interest in the furniture, the court instructed the jury that if she, as defendant's wife, bought articles for family use from time to time, paying for them partly with her own earnings and partly with money furnished by her husband, and not discriminating or separating part of the property as her own from the rest, and there being nothing in the articles themselves to indicate that they were for her personal and exclusive use, it would be *prima facie* evidence that she did not claim or have any separate title or exclusive right in any portion of them; but if the jury found that she did purchase with her own funds and on her own account, and had any right in the property to the exclusion of the husband, she would have a right to transfer such interest to the plaintiff; and that a loan by the plaintiff to the husband would be a sufficient consideration in law to sustain such a transfer, and that no written bill of sale or formal delivery would be necessary, if it were distinctly understood and agreed that there should be such a transfer of ownership to the plaintiff. Verdict for defendant. Plaintiff excepted.

A. V. Lynde, for the plaintiff.

A. F. L. Norris, for the defendant.

By Court, GRAY, J. The first question raised by this bill of exceptions is whether the superior court rightly refused to admit the plaintiff's daughter as a witness.

Her testimony, so far as it went to show that the defendant had married and cohabited with the witness while she had another husband living, tended to prove that the defendant had been guilty of adultery. The law, upon considerations of public policy, and of preserving the harmony of the marriage relation, independent of any interest of parties or witnesses, will not allow a wife in any case, civil or criminal, to be a witness against her husband, or to testify to any fact which directly tends to show him to have been guilty of a crime, other than an injury to her person, in which case she is admitted to support an indictment against him, for the sake of

bringing him to justice: *Fitch v. Hill*, 11 Mass. 288; *Commonwealth v. Murphy*, 4 Allen, 491; *Commonwealth v. Sparks*, 7 Id. 585; *Stein v. Bowman*, 13 Pet. 221, 222. This incompetency of the wife to be a witness against her husband is not affected by the recent statutes; for the general provisions removing disqualification by reason of interest and enabling parties to testify do not affect this exclusion on grounds of public policy; and the provisions expressly authorizing husbands or wives to testify are limited to cases in which the wife is a party or one of the parties: Gen. Stats., c. 131, secs. 13, 14, 16; *Burlen v. Shannon*, 14 Gray, 437, 438; *Barber v. Goddard*, 9 Id. 72.

But when a husband is proved to have married a second wife, leaving the first, though the first wife is not a competent witness against him, the second is, not being in law his wife: 1 Hale P. C. 693; Gilbert on Evidence, 3d ed., 137; Bull. N. P. 287; 1 East P. C. 469. And upon like reason, a woman duly proved to have been previously married to a man still living and still her husband is doubtless a competent witness against a second husband. The practice, both in England and in this country, as stated in some modern treatises, has been to prove the earlier marriage by independent evidence; and there are respectable judicial opinions that it cannot be proved by the testimony of the wife herself: 1 Greenl. Ev., sec. 339; Best on Evidence, sec. 173; *Peat's Case*, 2 Lew. C. C. 288; *Rose v. Niles*, Abb. Adm. 411; *Queen v. Madden*, 14 U. C. Q. B. 588. But the earlier books already cited suggest no such limit of the means of proving the earlier marriage; and there are decisions of at least equal authority in favor of admitting a woman to testify against one appearing to be her husband, upon its being shown by her own examination that she is not his lawful wife: *Batthews v. Galindo*, 1 Moore & P. 565; S. C., 4 Bing. 610; *Wells v. Fletcher*, 5 Car. & P. 12; *Regina v. Young*, 5 Cox C. C. 296. If the case required a determination of this question, it would be necessary to examine and weigh these conflicting decisions and the reasons on which they are founded. But this case may be decided without entering upon such an investigation.

The state of facts offered to be shown by the witness was only that more than twenty years ago she was married to another man, and lived with him for a few months, and about four years afterwards married the defendant, without having heard of her first husband's death. No evidence was offered that the first husband had been heard from for twenty years,

or that he had not died or been divorced from her before her second marriage. Under the circumstances of this case, the presumption of the wife's innocence in marrying again might well overcome any presumption that a man not heard from for four years before the second marriage or for sixteen years afterwards was alive and her lawful husband when she married the second time: *King v. Twynning*, 2 Barn. & Ald. 386; *Lapsley v. Grierson*, 1 H. L. Cas. 505; *Loring v. Steineman*, 1 Met. 211; *Greensborough v. Underhill*, 12 Vt. 604. The judge presiding at the trial could not admit her as a witness against the defendant without being satisfied that she was not his lawful wife; and as no sufficient evidence was offered that at the time of marrying him she had a former husband, she was rightly excluded from testifying.

The instructions given to the jury were well adapted to the facts disclosed by the evidence, and are stated in the bill of exceptions with such fullness, precision, and clearness as to require no further demonstration of their accuracy.

Exceptions overruled.

PRESUMPTION OF DEATH FROM ABSENCE: See *Stinchfield v. Emerson*, 83 Am. Dec. 524; and see *Commonwealth v. Thompson*, 83 Id. 653, where it was held that a man could not be convicted of adultery for marriage and cohabitation with a woman whose husband had remained absent for more than seven years without being heard from.

COMPETENCY OF HUSBAND AND WIFE AS WITNESSES for and against each other: See *Chamberlain v. People*, 80 Am. Dec. 255, and note 258, citing other cases.

RICHARDSON v. BOYNTON.

[12 ALLEN, 128.]

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT SIGNATURES TO BOND WERE MISPLACED by mistake, and that the party who signed in the place marked for witnesses really signed as surety, and that the other party, who signed in the place marked for sureties, signed as a witness only.

GUARDIAN BY IMPROVIDENTLY INVESTING WARD'S MONEY IN NOTE OF SINGLE PERSON renders the sureties on his bond liable for any loss that may occur, although he dies and the borrower becomes administrator of his estate, and in settling the account of his intestate as guardian returns the note as assets of the ward's estate.

CONTRACT upon guardian's bond. The opinion states the facts.

T. H. Sweetser and F. A. Worcester, for the defendants.

T. Wentworth and A. F. Jewett, for the plaintiff.

By Court, CHAPMAN, J. Eli Boynton, deceased, was appointed guardian of Orlando Boynton, a minor, and gave bond as such guardian. The defendant Butterfield, who is sued as one of his sureties, denies that he executed the bond as surety. He makes this denial on the ground that his name is not written on the bond under that of Eli, and near the seal, but on the left hand, under that of Samuel Parker, whose name is signed as a witness under the attestation clause. He says this imports nothing more than that it was signed, sealed, and delivered by others in his presence. *Prima facie* it is true that such a signature imports nothing more than this; but this presumption is not conclusive, and may be rebutted by evidence.

In respect to a memorandum within the statute of frauds, there is no restriction as to the place of the signature. It may be at the top or in the body of the memorandum, as well as at the foot: Browne on the Statute of Frauds, sec. 357. But this depends on the intention of the party in writing his name, and if it appears that he intended a further signature before the writing should take effect, the name in the body of the instrument will not be regarded as a signature: *Hubert v. Turner*, 4 Scott N. R. 481. In *Coles v. Trecothick*, 9 Ves. 251, Lord Eldon said that "where a party, or principal, or person to be bound signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as principal." But the correctness of this remark has been questioned, and it is to be taken with some restrictions: *Gosbell v. Archer*, 2 Ad. & E. 500. In *Reed v. Drake*, 7 Wend. 345, the obligors in a bond signed and sealed it after the penal part, and before the condition; yet the condition was held to be as much a part of the bond as if the signature had been at the foot of it. By the condition it was an arbitration bond; and evidence was admitted to prove that the condition was upon it when delivered, and that it was delivered as an arbitration bond in pursuance of an agreement of the parties. In *Welford v. Beezely*, 1 Ves. Sr. 6, it appeared that marriage articles had been executed, to which the mother of the wife was intended to be a party. She was held bound by them, though she subscribed them as a witness only. If a stranger to a note writes his name on the back at its inception, he is held to be an original

-promisor, but parol proof as to the time when he writes his name is admissible to vary the terms of the liability: *Union Bank of Weymouth v. Willis*, 8 Met. 504, and cases cited.

Undoubtedly, it is important that the signature, and also the seal, of an instrument should be in the usual place. But the cases cited above show that the mere place of either the signature or the sealing is not conclusive as to the intent with which they are made. The present case furnishes an illustration of the propriety of the admission of extraneous evidence to show the intent in application to the signature of David Boynton. The bond commences as follows: "Know all men by these presents, that we, Eli Boynton, of Malden, in the county of Middlesex, as principal, Isaac Boynton, Jr., and William Butterfield, both of Pepperell, as sureties." The signatures at the right hand are Eli Boynton, Isaac Boynton, Jr., and David Boynton, with a seal against each name. If the place of the signature were conclusive, David Boynton's name must be treated as that of a surety without words to bind him, and the bond would have but one surety. But the extraneous evidence that he did not sign as a surety, and that Butterfield signed it intending to become a party to it, that he sealed it as his bond, and delivered it as his bond, clearly establish the fact that David Boynton and Butterfield wrote their names in the wrong place by mistake or error. A rule that would exclude such evidence would tend to obstruct justice rather than promote it. The fact that a man seals and delivers a bond as his, in which he is named as surety, and that he does this with the intent to become a party to it, is amply sufficient to justify a verdict that it is his bond, though his name is placed upon it in the proper place for the name of a witness.

It appears that Eli Boynton, as guardian of Orlando, lent to his son, John E. Boynton, the sum of eight hundred dollars, being part of the ward's money, and took therefor the note of John E., without any other security. This is admitted to be an improvident disposition of the money, and it was wholly unjustifiable: *Harding v. Larned*, 4 Allen, 426; *Clark v. Garfield*, 8 Id. 427. The present guardian is not bound to accept the note as part of the assets, and if the minor had become of age he would not be bound to accept it. The sureties in the bond became liable for the money immediately. The decease of Eli and the appointment of John E. as his administrator did not relieve them from this liability. Nor had the administrator power to make the note assets by returning it

as such in his account rendered in the probate court. He had no more power in this respect than his intestate, Eli, had. It is contended that it was paid by operation of law in consequence of his appointment as administrator. But if it was thus paid, it was paid to him as administrator, and thereby became canceled. And instead of accounting for the note in his guardianship account, he ought to have accounted for the avails. As the matter stands, he is liable for the money as administrator of the principal, and Isaac Boynton, Jr., and Butterfield are liable as sureties.

Exceptions overruled.

INVESTMENTS BY GUARDIANS AND OTHER TRUSTEES, and liability for losses by: See note to *Nyce's Estate*, 40 Am. Dec. 506-518.

THE PRINCIPAL CASE IS CITED IN *Warren v. Chapman*, 115 Mass. 586, to the point that when the attestation to an instrument is misplaced thereon, parol evidence is admissible to explain the mistake.

BANK OF BRIGHTON v. SMITH.

[12 ALLEN, 262.]

IN ACTION AGAINST SURETY ON BANK CASHIER'S BOND, after plaintiffs have proved that it was the custom of the directors to have an examination of the affairs of the bank once in six months, and of the cashier to lay before them twice a week a general statement of the condition of the bank, and that on a particular day the cashier presented to the directors a statement which purported to show the condition of the bank, evidence is admissible on their part of the cashier's admissions made at that time in reply to questions put to him by the directors concerning such statement, that the same was false, and that he embezzled certain sums, and forced the accounts of the bank.

SURETIES WHO ARE SEVERALLY AND NOT JOINTLY BOUND in sum of two thousand dollars each upon an official bond taken in the penal sum of twenty thousand dollars from ten sureties may be held liable in the full sum of two thousand dollars, if an unsatisfied defalcation of the principal exceeds that sum, although such defalcation is less than twenty thousand dollars.

BOND IN PENAL SUM DOES NOT CARRY INTEREST, but interest on such sum may be added by way of damages for the detention thereof, after it is the duty of a surety to pay the same.

CONTRACT upon a bond in the penal sum of twenty thousand dollars. The opinion states the facts.

J. G. Abbott, for the defendant.

B. F. Thomas and G. A. Somerby, for the plaintiff.

By Court, COLT, J. This is an action against the defendant as surety in a bond conditioned that one Woodworth, the principal, should faithfully perform and discharge all the duties which were assigned, or which might thereafter be assigned, to the office of cashier of the plaintiffs' bank, and faithfully observe and obey all the by-laws of said bank, and all the rules and regulations which were then or might thereafter be adopted by the president and directors of said bank. It appears by the report of the auditor, upon which judgment was rendered by the superior court, that it was the custom of the directors to have an examination of the affairs of the bank once in six months, and of the cashier to lay before them twice a week a general statement of its condition, showing its assets and liabilities. On the 20th of September, 1858, Woodworth, still filling the office of cashier, presented to the directors a written statement which purported to show the condition of the bank on the 18th of that month. In answer to questions put to him by the directors on that occasion, Woodworth made certain verbal admissions, and stated certain facts, showing that the account as then rendered was a false exhibit of the affairs of the bank. The auditor admitted these verbal statements and admissions as evidence, and the defendant objects that they were improperly received. We think this objection cannot be sustained. The statements were made in the course of the duty for the faithful performance of which by the cashier the defendant had bound himself. They were made while the cashier was still in office, they accompanied and explained an official act, and must be regarded as part of the *res gestæ*. They were not like declarations made by the principal subsequent to the act to which they related, and out of the course of his official duty. The surety is indeed to be held responsible only for the actual conduct of the party, and not for what he may say he has done; his mere narrations of past transactions, though made while still in office, may not be competent evidence to prove the truth of the facts stated in an action against the surety alone on a bond which was not in its nature joint, and while the principal may be called as a witness. But in this case, his written statement, and his accompanying verbal explanations, are in the nature of written and verbal acts, and constitute a part of his official conduct. They are like entries made in the course of duty, and are as such admissible in evidence, though the party making them is living, and competent to testify. It

does not appear in this case to be necessary to hold that these statements were competent to establish the fact of the misappropriation of the funds of the bank at some time before. The objection to their admission was general, and the exception cannot be sustained if it appears that they were competent for any limited purpose. And for the purpose of showing the unfaithful performance of the official act they accompanied, as part of a chain of evidence tending to establish a breach of the condition of the bond, they were competent: *Middleton v. Melton*, 10 Barn. & C. 317; 1 Greenl. Ev., sec. 115; *Amherst Bank v. Root*, 2 Met. 522; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Lexington and West Cambridge R. R. v. Elwell*, 8 Allen, 371.

The defendant further claims that the sureties of the cashier are only liable for \$13,750, the amount of the ascertained deficit, exclusive of the two drafts on time drawn on the Fulton Bank; and that each of the ten sureties are liable for only one tenth of that sum, and not each for the whole penalty. By the terms of the obligation which the defendant entered into, he with ten others bound themselves severally, and not jointly, as sureties, each in the sum of two thousand dollars, for Woodworth, the principal. And the sufficient answer to this claim is, that so long as the unsatisfied defalcation of the cashier exceeds the amount for which this defendant agreed to be held, the plaintiffs may pursue him and the other sureties, and recover judgments against each to the extent of their several liabilities, though only one satisfaction on execution can be had upon the judgments so obtained. And this consideration renders it needless to inquire whether the sureties are liable, in addition to the sum above named, for the two drafts which it is alleged were illegally drawn by the cashier with the approbation of the president and directors of the bank.

The remaining point for consideration is the ruling of the superior court that damages should be awarded for the full penalty of the bond, with interest from September 23, 1858. It appears that at the date named the amount of the defalcation was ascertained and charged to the cashier on the books of the bank. The defendant claims that judgment can only be rendered for the penalty of the bond without interest. In suits against sureties, the limitations which by the contract they make to their liability are to be strictly upheld. It may be that as between the principal and the plaintiffs in this case, interest from the time of the misappropriation of the funds intrusted to him might be recovered of the principal as consti-

tuting a part of the damages occasioned by his misconduct. Or if the extent of the defalcation and interest so added had in this case fallen short of or did not exceed the penalty in the defendant's bond, such interest might be taken into account in ascertaining for what portion of the penalty judgment should be rendered. But the measure of the principal's liability ceases to operate as the rule against the surety when that liability exceeds the penalty agreed on. The surety has a right to say, I agreed to be liable for such losses as may be occasioned by the principal only to the extent fixed, although that loss is in part made up of interest on money wrongfully taken. But it does not follow that the surety can in no case be held liable for interest upon the penalty. The true rule seems to be that the surety may be liable for interest on the penalty, not as part of the debt for which he originally became responsible, but as damages for its detention. There is a plain distinction to be observed between cases in which interest is given by way of damages, and those in which it constitutes a part of the debt, as it does in contracts in which there is a promise to pay interest. As a general rule, in all cases in which a debtor is in default for not paying money in pursuance of his contract, he is liable for interest thereon from the day of his default, and when a demand is necessary to put the debtor in fault, interest is to be given only from the demand. Where interest is not stipulated for as part of the contract, it is given by way of damages for the detention of the money. If the surety becomes charged by the default of the principal for the amount of the penalty, or any portion of it, it is his duty to pay the same on demand; and if he neglects or refuses, the general principle above stated applies, and the interest is added by way of damages for his own default, not as enlarging in any degree his liability for the misconduct of the principal.

The liability of an insurer upon a policy of insurance illustrates the principle applicable here. The contract of an insurer is a contract of indemnity. It is an engagement to pay an amount not exceeding a given sum on the happening of certain losses; and yet interest is recoverable upon the whole amount insured, after proof of loss and demand of payment: *Oriental Bank v. Tremont Ins. Co.*, 4 Met. 1.

The case of *Harris v. Clap*, 1 Mass. 308 [2 Am. Dec. 27], cited by the plaintiff, seems to stand well upon this doctrine. It was an action against principal and surety in an arbitration bond for the penal sum of five thousand dollars, conditioned to

pay the award within 120 days after the making of it. The amount awarded was less than the penalty, but with interest added from the expiration of the 120 days exceeded it. In point of fact, the suit on the bond was commenced but a short time after the expiration of the time of payment. And upon a careful examination of the several opinions given, it appears that a majority of the court intended to affirm the doctrine stated by Sewall, J., in these words: "In this suit the plaintiff cannot recover beyond the penalty of this bond and the damages for the detention of it, which may be considered as legally demanded at the service of the writ. The penalty and interest from the demand must be the measure of the judgment; not exceeding, however, the sum awarded and interest on it from the time of payment according to the condition of the bond. And the judgment must be entered for that amount, viz., five thousand dollars, as recovered for debt, and the residue as damages for the detention."

In *Warner v. Thurlo*, 15 Mass. 154, where it was held that in a suit upon a replevin bond damages may be recovered beyond the penalty so as not to exceed interest on the penalty from the commencement of the action, the court say, with *Harris v. Clap*, *supra*, in mind: "Further than that, no case decided in this commonwealth will be found to have gone." The decisions of this court therefore justify the allowance of interest when the surety is in fault, though the judgment should thereby be made to exceed the penalty.

The case of *Brainard v. Jones*, 18 N. Y. 35, states that the same doctrine is now recognized by the courts of New York, Comstock, J., remarking: "The rule has often been laid down in general terms that sureties are not liable beyond the penalty of the bond in which their obligation is contained. But on a careful examination of the reason and justice of the rule, it will be found inapplicable to a question of interest accruing after they are in default for not paying according to the condition of the bond. There is a plain distinction which has sometimes been lost sight of, and consequently some confusion and contradiction will be found in the cases on this subject. Where the sum claimed becomes a debt actually due from them, and they continue in default, the question, properly considered, is one of damages for the delay."

In this case, then, interest is to be added to the penalty as damages for the detention for such time as the case shows the defendant to have been in fault for its non-payment. His un-

dertaking by its express terms was not that of a joint promisor with Woodworth, and he cannot be said to have been in fault until notice that he had become liable, and demand for payment. No notice was given or demand made until the commencement of this action; and interest ought not to have been allowed before the date of the writ. To this extent the defendant's exceptions are sustained, but the plaintiffs may remit of the amount for which execution is to issue all except two thousand dollars, with interest from the date of the writ, and take execution for that amount.

INTEREST IS NOT RECOVERABLE IN ACTION ON BOND given in penalty: *Fraser v. Little*, 87 Am. Dec. 741; and also *Simmons v. Almy*, 103 Mass. 36, where the principal case is cited; but it may be added by way of damages for detention of the amount due after it is the duty of a surety to pay it: *Leighton v. Brown*, 98 Id. 516; and *Hewitt v. Rivers*, 103 Id. 401, where the principal case is cited.

THE PRINCIPAL CASE IS CITED IN *Pratt v. Ogdensburg & L. O. R. R. Co.*, 102 Mass. 565, to the point that declarations by an agent not in the scope of his authority are not admissible against the principal.

DWIGHT v. MAYOR.

[12 ALLEN, 316.]

SHARES OF STOCK IN FOREIGN MANUFACTURING CORPORATION ARE PERSONALTY, and if owned by citizens of Massachusetts are taxable there for their full value, without deducting the value of machinery and real estate belonging to the corporation, which is in the place of its corporate existence, and there taxed.

PETITIONER, a citizen of Massachusetts, owned certain shares in a Maine corporation, and was taxed for them at their full value, notwithstanding the machinery and real property of said corporation was situate and taxed in the state of Maine. Petitioner prayed abatement of his tax, which was refused.

F. C. Loring and J. T. Morse, Jr., for the petitioner.

P. W. Chandler and J. B. Thayer, for the respondents.

By Court, DEWEY, J. Shares in a manufacturing corporation are personal estate, and as such are taxable in the place where the owner resides. In the absence of any statute authorizing a deduction in making an assessment of any portion of the capital which they represent, they are to be taxed at their fair market value, and as representing so much personal

estate held by the owner. The enactments in the General Statutes, c. 11, sec. 12, cl. 2, making provision for assessing the machinery and real estate of such corporations in the towns in which they are situated, and requiring a deduction from the value of the shares to a corresponding amount, are entirely local in their character, and apply only to manufacturing corporations chartered within the commonwealth. The clause in this section of the statute requiring a deduction of the value of machinery and real estate is not to be taken as a general provision regulating the taxation of all shares in manufacturing corporations wherever the corporations may be situated, but as directly connected with the previous clause, requiring the assessment of the machinery and real estate in the towns where the machinery is situated and employed. That provision can only be applicable to manufacturing corporations established within this commonwealth, as it is only in relation to such corporations that our legislature could so require. As to them having provided for taxation of a certain part of the capital in the towns in which they were situated, the statute requires a deduction of a like amount from the value of the shares, in order to avoid double taxation in this commonwealth of property wholly taxable here. But our whole system of taxation, as established and practiced, is to disregard the liability of shares in foreign corporations to taxation in the states where they are situated. Thus shares in foreign railroad corporations held by citizens of this state are fully taxed here, and no deduction is made for any taxation to which the corporations are subject in the states where they are situated. So it is in regard to shares held by our citizens in banks, insurance companies, and other moneyed corporations situated in other states. Such shares, when held by our citizens, are here treated as so much personal estate, following the person of the owner, and taxable at their full value in this commonwealth, regardless of what may be the foreign law as to taxation of the capital or any part of it elsewhere. The evidence of usage was insufficient to control the legal interpretation of a provision of the statute.

Petition dismissed.

SHARES OF STOCK, WHERE TAXABLE: See the note on this topic to *City of New Albany v. Meekin*, 56 Am. Dec. 527 et seq. To the point that shares of stock in a foreign corporation are taxable at the residence of the owner, see the principal case cited in *Bradley v. Bander*, 36 Ohio St. 36.

BOSTON AND SALEM ICE CO. v. ROYAL INS. CO.
ADAMS v. PARK FIRE INS. CO. ADAMS v. SUFFOLK FIRE INS. CO.

[12 ALLEN, 377.]

INSURANCE POLICY UPON GOODS WILL NOT BE DISCHARGED BY EXECUTORY CONTRACT FOR SALE thereof, in which there has been a receipt of a portion of the purchase-money, if the title to the goods at the time of the loss remains in the person insured; and his right to recover will not be limited to the balance of purchase-money remaining due.

CONTRACT upon three policies of insurance issued upon a stock of ice belonging to the Boston and Salem Ice Company. It appears that the ice company had agreed that they would sell to one Weed all the ice in their ice-houses (being the ice insured in the policies sued on) for a certain sum to be paid in cash, the residue to be paid in two installments at six and nine months. Weed was to have the right to remove any of the ice before making the final payment on paying a certain sum per ton; but it was agreed that the whole of the ice should remain the property of the company until removed, and that if Weed neglected to make the payments for ten days after due, the company should have the right to treat the agreement as null and void, or sell the ice, and charge Weed with the loss by the sale. Weed agreed to remove all the ice within three months, and to pay the expense of insurance after that time. Before the expiration of the three months, the houses and ice were burnt and lost. Weed, in a former action, sought to recover the first payment made by him. On appeal (*Weed v. Boston & S. I. Co.*, 12 Allen, 377), the court decided that under such an agreement the title remained in the ice company to the time of the destruction of the property. The company then sued for the insurance money. Judgment went for plaintiffs, and defendants appealed.

D. Foster and J. C. Davis, for the defendants.

N. Morse, for the plaintiffs

By Court, HOAR, J. The question at issue in these cases is settled by the judgment of the court in *Weed v. Boston and Salem Ice Co.*, 12 Allen, 377. When the ice was destroyed it was the property of the ice company; and though they had made a contract to sell it to Weed, and had received an installment of the purchase-money, the property had not passed; it remained at their risk; and when the execution of the con-

tract became impossible, they were bound to refund what had been paid to them as money received on a consideration which had failed,—*res perit domino*. The plaintiffs' interest was as great at the time of the loss as at the time when their policies were effected, and they are entitled to recover to the full extent of their claim.

Judgment according to the agreement in each case for the full amount of the insurance, interest, and costs.

WHAT ALIENATION OR TRANSFER OF PROPERTY INSURED WILL AVOID POLICY: See the extended note to *Morrison v. Insurance Co.*, 59 Am. Dec. 305 et seq.

WORTHINGTON v. BEARSE.

[12 ALLEN, 332.]

MORTGAGOR OF VESSEL SELLING HIS REMAINING INTEREST, and stipulating with the purchaser that he, the seller, will pay off the mortgage if he fails to comply with the stipulation, so that the bargain is given up and the title reconveyed to him, may recover on a policy of insurance issued to him before his agreement of sale for a loss to the vessel after reconveyance; and this whether the contract be construed to have passed title or not.

CONTRACT upon policy of insurance upon seven eighths of a schooner. The assured had mortgaged his interest to plaintiff, and afterwards conveyed thirteen sixteenths of the schooner to one Lovell, stipulating at the same time to pay off said mortgage. He failed to do so, and the bargain was given up, Lovell conveying to Nickerson the interest he acquired under the contract. Thereafter the vessel was lost, and this action brought. The remaining facts appear in the opinion.

G. Marston, for the defendants.

T. M. Hayes and J. D. Howe, for the plaintiff.

By Court, BIGELOW, C. J. We entertain no doubt that the defendants are liable for the full amount insured by the policy. This liability rests upon two grounds, either of which is sufficient to sustain the plaintiff's claim.

In the first place, on the facts stated, the alleged sale by the assured of thirteen sixteenths of the vessel covered by the policy was incomplete, and never took effect so as to extinguish his insurable interest therein. One of the essential stipulations of the agreement of sale was not complied with.

The vendor expressly agreed to pay the amount due on the mortgage of his share of the vessel, and to procure a release from the mortgagee. This, the case finds, he did not and could not do. Until this part of the contract was complied with, the vendee had a right to avoid the sale and rescind the whole bargain. The delivery of the bill of sale passed a title only at the election of the vendee. He might, within a reasonable time after the failure of the assured to fulfill his contract of sale by procuring a release of the mortgage on the vessel, elect to restore the legal title and recover back the consideration of the transfer. During this time the plaintiff had a continuing and subsisting interest in the vessel. The transfer could not be regarded as absolute and complete, but only conditional on a compliance with the terms of the bargain. A mere transfer of the legal title of a vessel does not extinguish a right to recover on a policy if the party making the transfer still retains any right or interest in the vessel or her proceeds: *Gordon v. Mass. Ins. Co.*, 2 Pick. 249; *Lazarus v. Commonwealth Ins. Co.*, 19 Id. 81; *Wilson v. Hill*, 3 Met. 66, 71. The insured clearly had an interest in the preservation of the vessel until it was certain that the contract for her sale had become complete, and the title to her had vested absolutely in the vendee. In this view of the facts, the insured did not forego his right to recover on the policy pending the transactions in relation to the transfer of the vessel.

But if it were otherwise, and it had appeared that the sale of the vessel was complete and absolute, so that for a time the insured had parted with his insurable interest, his right to recover on the policy was not gone forever. It was only suspended during the time that the title to the vessel was vested in the vendee, and was revived again on the reconveyance to the insured during the term specified in the policy. The insurance was for one year. There was no stipulation or condition in the policy that the insured should not convey or assign his interest in the vessel during this period. The contract of insurance was absolute to insure the interest of a person named in a particular subject for a specific time; for this entire risk an adequate premium was paid, and the policy duly attached, because the assured at the inception of the risk had an insurable interest in the policy. So, too, at the time of the loss all the facts necessary to establish a valid claim under the policy existed. The execution of the policy, the interest of the assured in the vessel, the due inception of the risk, a

compliance with all warranties expressed and implied, and the loss by a peril insured against, are all either admitted or proved. Upon what legal ground, then, can it be maintained that the policy has become extinct? No fact is shown from which any inference can be made that by the alienation of the title to the vessel during the time named in the policy the risk of the insurers upon the subsequent retransfer of the vessel to the assured was in any degree increased or affected, or that any loss, injury, or prejudice to the underwriter was occasioned by the fact that the absolute title to the vessel was temporarily vested in a third person. On the contrary, such temporary transfer of title would seem rather to have inured to the benefit of the insurers, because they have received a premium for a risk from which they were exempted during a portion of the time designated in the policy. In the absence of any express stipulation, as in the policy declared on, no return premium could be claimed by the assured by reason of any temporary suspension of the risk or withdrawal of the subject insured. The policy had attached, and the risk was entire. During the time that the vessel was owned by a person other than the assured, no loss could happen which would be covered by the policy. The insured, having no interest, could sustain no loss. If a total loss occurred during the period, the insurable interest would become extinct. Upon a retransfer of title to the insured, the policy would revive only to recover the renewed interest thereby acquired, and not to render the insurers liable for losses which may have happened during the intermediate period. The sole effect would be to suspend the risk for the time during which by reason of the transfer the assured had no interest in the subject insured, and to revive it as soon as the original interest was revested in him. The transfer of the vessel rendered the policy inoperative, and not void. It could have no effect while the insured had no interest in the subject insured. But when this interest was revived or restored during the term designated in the policy, without any increase or change of risk or other prejudice to the underwriter, there seems to be no valid reason for holding that the policy has become extinct. Inasmuch as neither the subject nor the person insured is changed, and the risk remains the same, the intermediate transfer is an immaterial fact, which can in no way affect the claim under the policy.

This doctrine is not only consistent with sound reason, but it is in accordance with the analogies of the law of marine

insurance. Risks may be temporarily suspended and subsequently revived without invalidating the right of the assured to claim under the policy. Unseaworthiness after the policy has attached, if imputable to the neglect or other fault of the assured, will suspend but not destroy the risk. Restoration of the navigability of the vessel will revive the right of the assured to claim under his policy: *Taylor v. Lowell*, 3 Mass. 331 [3 Am. Dec. 141]; 1 Phillips on Insurance, sec. 734. So goods insured for a voyage, which by the terms of the policy are covered only when water-borne, may be withdrawn from the risk while temporarily placed on land, but the policy upon them will revive when, without increase of risk, they are again put on board the vessel. In these and like cases the principle adopted is, that the contract of insurance is not violated, or the right of the assured to claim an indemnity affected, by the existence of a state of facts which does not contravene any stipulation in the policy, or in any way change or affect the risk, or otherwise work any injury or prejudice to the rights of the insurer: *Carroll v. Boston Marine Ins. Co.*, 8 Mass. 515; *Power v. Ocean Ins. Co.*, 19 La. 28 [36 Am. Dec. 665]; *Howard v. Albany Ins. Co.*, 3 Denio, 301, 303; 1 Phillips on Insurance, sec. 89.

Judgment for the plaintiff.

WHAT ALIENATION OR TRANSFER OF INSURED PROPERTY WILL AVOID POLICY: See the note to *Morrison v. Insurance Company*, 59 Am. Dec. 305 et seq., citing many cases, and among them the principal case, at page 306; and see the preceding case.

GAGE v. MORSE.

[12 ALLEN, 410.]

CONSIGNEE OF VESSEL IS NOT LIABLE FOR DEMURRAGE if the bill of lading contains no provision for the payment thereof; and certainly not if he assigns the bill of lading before any of the cargo has been delivered.

CONTRACT against consignee named in the bill of lading for demurrage. The agreed statement of facts shows that Hunter & Co. shipped a cargo to defendant at Boston, taking a bill of lading providing that the consignee or his assigns should pay the freight. There was no provision concerning demurrage. The day the vessel arrived at Boston, the master, in writing, notified the consignee of his readiness to discharge the cargo. On the same day, the cargo was sold to the Whipple File

Manufacturing Company. The consignee agreed to pay the freight, and notified the master of the vessel of the sale and agreement. The cargo was then delivered to the purchaser, but not until after five days' loss of time, which was not attributable to the fault of the master. Defendant paid the freight, and this action was then brought. Judgment for defendant. Plaintiff appealed.

J. Nickerson, for the plaintiffs.

D. Thaxter and F. Bartlett, for the defendant.

By Court, HOAR, J. The defendant is not liable, unless upon some contract, express or implied, by which he has agreed to pay the plaintiff demurrage. No express contract is shown; and we are unable to perceive that any can be implied from the facts agreed.

The direct contract of the plaintiff under the bill of lading was with the shipper of the coal: *Blanchard v. Page*, 8 Gray, 281, 290-295. The defendant was the consignee; and the cargo, by the terms of the bill of lading, was to be delivered to him or his assigns. The receipt by him of the cargo, which was to be delivered upon payment of the freight, would have been evidence of an agreement to receive it upon the terms named in the bill of lading, and so of a liability to pay the freight. And when a bill of lading has contained a stipulation for demurrage, either expressly or by reference to the charter-party, the acceptance of the goods has been held to be evidence of an agreement by the consignee to pay demurrage as well as freight: *Jesson v. Solly*, 4 Taunt. 52. In that case, Chief Justice Mansfield said: "If the consignee will take the goods, he adopts the contract." *Stindt v. Roberts*, 5 Dowl. & L. 460, and *Wegener v. Smith*, 15 Com. B. 285, are to the same effect, and apply the doctrine to the indorsees of the bill of lading. But as the consignee and his assigns are not parties to the contract in the bill of lading, and are only liable upon the contract which may be implied upon the actual delivery of the cargo and waiver of his lien by the master, they are not bound to accept the cargo at any particular time, and incur no responsibility by a refusal or delay in accepting it. The contract implied from its acceptance can extend no further than the conditions upon which its delivery is made dependent by the terms of the bill of lading. Where the bill of lading contains no provision for the payment of demurrage, no case has been cited to show that the consignee or his as-

signee is liable for demurrage; and the English authorities are uniformly against such a liability: *Young v. Møller*, 5 El. & B. 755; *Chappel v. Comfort*, 10 Com. B., N. S., 802; *Smith v. Sieveking*, 5 El. & B. 589.

The defendant would not have been answerable in this action, therefore, if he had received the coal. But as, before any of the coal was delivered, he had assigned the bill of lading to the Whipple File Manufacturing Company, to whom the coal was delivered, he had no contract whatever with the plaintiff, express or implied. His agreement with that company to pay the freight was a contract with them only, to which the plaintiff was not a party.

Judgment for the defendant.

HALSEY v. McLEAN.

[12 ALLEN, 489.]

CREDITOR OF CORPORATION WHICH WAS ESTABLISHED IN NEW YORK under the statute of that state, which provides that stockholders and officers shall be personally liable as a penalty in certain contingencies, cannot maintain his action in Massachusetts to enforce his claim personally against a stockholder or officer of the corporation.

CONTRACT on an account for services rendered by plaintiff as superintendent of a quarry in Massachusetts, belonging to the Lee Marble Quarrying Company of New York, against the defendant, as one of the trustees and stockholders of such company. The liability is based on the statute of New York under which the corporation was organized, and which provides that on failure to file certain reports and returns the officers and stockholders shall be personally liable. The facts are further explained in the opinion.

M. Wilcox, for the defendant.

I. Sumner and J. Branning, for the respondent.

By Court, FOSTER, J. The report of the auditor raises the question whether upon the facts of the present case this court will enforce the liabilities imposed upon trustees or stockholders of a corporation organized under the general manufacturing corporation act of New York, passed February 17, 1848. The principles by which we must be controlled are sufficiently well established. Wherever the common or statute law of one government enters into and forms a part of a contract which

is brought before the tribunals of another for enforcement, and is not there treated as immoral or contrary to public policy, the *lex loci contractus* is resorted to to determine its validity and construction, however that may differ from the law prevailing in the forum of the remedy. The contract of the New York corporation in the present case must, however, receive the same construction, and the liability of the defendant here must depend upon the same principles, whether it was actually made in Massachusetts or in New York; because if made here, it was in legal contemplation made with reference to the New York acts, and in view of the contingent liabilities thereby imposed upon officers and stockholders, which are equally applicable to contracts entered into within and without the sovereignty which incorporated the company: *Hutchins v. New England Coal Mining Co.*, 4 Allen, 580.

How far a mere statute obligation shall be respected and enforced beyond the jurisdiction by which it is created and limited, and within which alone it has the force of positive law, is a question of comity and public policy in the administration of justice. It is well settled that penal laws will be allowed no extraterritorial operation. Thus a usurious contract, not void under the statute of the state where it was entered into, but subject there to a deduction by way of penalty, will be enforced elsewhere in full without the deduction: *Gale v. Eastman*, 7 Met. 14. And it seems that a *qui tam* action founded on the statute of one state cannot be maintained in the courts of another, although a judgment recovered in such a suit elsewhere will support an action here: *Healy v. Root*, 11 Pick. 389.

An examination of the statute provisions relied upon by the plaintiff clearly shows that they do not leave the officers or stockholders in all cases personally liable for payment of the corporate debts. If they did, we should need carefully to consider whether under such a charter the members of the company do or do not remain in the condition of copartners at common law: *Ex parte Van Riper*, 20 Wend. 614; *Corning v. McCullough*, 1 N. Y. 47 [49 Am. Dec. 287]. Even in that case it has been doubted whether the courts of another state could give effect to such a remedial provision: *Drinkwater v. Portland Marine Railway*, 18 Me. 37. But this question we need not now decide.

By the statutes of New York of 1848, c. 40, sec. 12, every company organized under it is required annually, within

twenty days from the first day of January, to make and publish a report, stating the amount of its capital, the proportion paid in, and the amount of all existing debts; "and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." With reference to this section, the court of appeals has said: "The provision is highly penal, and the rules of law do not permit us to extend it by construction to cases not fairly within the language": *Garrison v. Howe*, 17 N. Y. 458. The default to publish the returns required by law imposes upon trustees in office a personal liability for all corporate debts existing while they are in default, but not for debts contracted after their retirement from office; and new trustees are not liable for debts contracted by their predecessors and chargeable to the latter for their default, but only for debts contracted while they are in office, and before a report is made and published: *Boughton v. Otis*, 21 Id. 261; *Chambers v. Lewis*, 28 Id. 454. The construction given to this provision by the courts of New York clearly establishes its qualified and penal character in their opinion. And we regard their construction as conclusive upon us. In this commonwealth, where the statute is not binding *proprio vigore*, no rule of comity permits or justifies any interpretation which would render the liability imposed by it more extensive here than in courts where it prevails with the force of positive law.

The alleged liability of the defendant as a stockholder depends upon the following sections of the same act:—

"Sec. 10. All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company until the whole amount of capital stock fixed and limited by such company shall have been paid in and a certificate thereof shall have been made and recorded."

"Sec. 18. The stockholders of any company organized under the provisions of this act shall be jointly and severally individually liable for all debts that may be due and owing to all their laborers, servants, and apprentices for services performed for such corporation."

"Sec. 24. No stockholder shall be personally liable for the

payment of any debt contracted by any company formed under this act which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due."

These provisions likewise have been declared by a New York court not to render the stockholders chargeable as co-partners: *Woodruff and Beach Iron Works v. Chittenden*, 4 Bosw. 417. The liability for non-payment of the capital stock is limited in the case of each stockholder to an amount equal to his stock. And to an action founded upon section 10, it would be a defense available to any shareholder that he had already paid debts to that amount. This provision is not as stringent as the one existing under the statute of Massachusetts, before the court in *Knowlton v. Ackley*, 8 Cush. 93; or that under the New Hampshire act, considered in *Erickson v. Nesmith*, 15 Gray, 221 [77 Am. Dec. 78]; S. C., 4 Allen, 233. In each of the latter cases, the stockholders were declared to be "jointly and severally liable for all debts of the company" until the whole capital was paid up, and a certificate thereof recorded. Yet they were held not to be original contractors, but only subject to a limited statute liability.

Furthermore, the present action was commenced November 19, 1864. The most recent of the causes of the action accrued in May, 1859. No evidence was offered that any suit had been brought against the corporation by the plaintiff. By section 24, quoted above, it is an indispensable condition to the liability of a stockholder for the payment of any debt contracted by the company that a suit for its collection shall be brought against the company within one year after such debt shall become due. The present plaintiff had therefore lost his right to the particular remedy prescribed by the New York act, and the only one he was entitled to in that state before he instituted proceedings in Massachusetts. If we possessed any jurisdiction to administer the remedy conferred by this section, comity would not require nor justice permit that it should be administered here in a case where, by the plaintiff's own neglect, it had ceased to exist in New York.

Independently of this consideration, we are of the opinion that the liability of stockholders for debts due to laborers under section 18, qualified as it is by the provisions as to the remedy in section 24, must be treated as a part of the statute

system of another state, incapable of execution *alieno foro*. We regard the principles laid down in *Erickson v. Nesmith*, *supra*, as applicable to all the provisions of the New York act which have been examined in the present case. The result is, that upon the auditor's report the defendant is entitled to judgment, and the verdict for the plaintiff must be set aside.

THE PRINCIPAL CASE IS CITED IN *Brigham v. Claplin*, 7 Nat. Bank. Reg. 420, to the point that courts will not notice or enforce penalties imposed by the laws of another state; and the liability imposed upon officers of a corporation for some neglect of duty by the corporation is said to be such a penalty.

GOODRICH v. BURBANK.

[12 ALLEN, 466.]

VENDOR OF LAND MAY RESERVE ASSIGNABLE RIGHT TO TAKE WATER from a spring situated upon the land, through pipes of certain dimensions, with the right to enter upon the land to make repairs, upon payment of the damages caused thereby; and such right need not be limited as to the place or manner of its enjoyment, nor annexed to any particular estate.

TORT. The opinion states the facts.

W. H. Swift and M. Wilcox, for the plaintiff.

H. L. Dawes and E. M. Wood, for the defendant.

By Court, FOSTER, J. This action of tort is brought to recover damages for the acts of the defendant on his own land, who has cut off a pipe by which water was conducted from a spring thereon, and has contaminated the water which flowed through said pipe to the plaintiff's premises. The lot on which the spring is situated was part of a farm owned by Thomas F. Plunkett, and conveyed to the defendant by Plunkett by a deed dated March 27, 1850, containing the following clause: "Also reserving to myself, my heirs and assigns, the right of taking so much water forever from the spring situate on the lot last above described, and from which water is now taken in a pipe to supply the grounds of W. H. Tyler, as now runs in said pipe, so long as said pipe lasts, together with the right to replace the same with a pipe of one and one quarter inch inside caliber, and also the right of taking so much water from said spring as will run in said pipe of one and one quarter inch caliber, when thus substituted for the present pipe, together with the right to enter and repair said aqueduct at all

times, it being understood that I am to pay such damages as may be from time to time occasioned to the crops and land by said repairs, and said Burbank, his heirs and assigns, is not to molest said Plunkett, his heirs and assigns, in the use of the above-reserved rights." At the date of this deed, the pipe was laid as it now is through the defendant's estate, and conducted water to the premises of W. H. Tyler. No part of Plunkett's remaining estate was then or ever had been supplied with water from this aqueduct. It is therefore improbable that the reservation was intended for the exclusive benefit thereof. Plunkett had given to Tyler no right, but the latter had only a revocable license from Plunkett's predecessor to the use of the aqueduct; and there is no reason to suppose that Plunkett intended to annex the reservation to the estate of a stranger, if that were possible. The language used is broad and unqualified. The right is reserved to Plunkett, his heirs and assigns, and not to the assigns of his remaining estate. There is no restriction as to the place where or the purpose for which the water might be used, but only as to the quantity reserved. We are therefore satisfied that Plunkett intended to retain for himself, his heirs and assigns, a right the enjoyment of which was limited to no particular premises, capable of being used upon any land which he or they might at any time acquire, an assignable and inheritable interest, not annexed to any parcel of land. If the rules of law permit the acquisition of such a right by reservation or grant, we cannot doubt that it has been effectually created in the present instance. And if so, it must inure to the benefit of the present plaintiff, who has derived it by warranty deed from Plunkett through divers mesne conveyances.

But the defendant insists that such an interest is a predial servitude, in its nature inseparably annexed to some estate, apart from which it cannot be enjoyed; that if regarded as an easement in gross, it is necessarily of a purely personal character, incapable of assignment or inheritance, belonging to Plunkett alone for his personal benefit.

This proposition requires examination. There are *dicta*, perhaps authorities, to the effect that an easement proper, like a way in gross, cannot be created by grant so as to be assignable or inheritable: Washburn on Easements, 80; *Ackroyd v. Smith*, 10 Com. B. 187. However the law may be elsewhere, it would be difficult to establish that doctrine in this commonwealth, where it has been held that ways in gross "may be

granted or may accrue in various forms to one, his heirs and assigns": *White v. Crawford*, 10 Mass. 188; and that "the law is settled in Massachusetts by a series of decisions that a right of way may be as well created by a reservation or exception in the deed of the grantor, reserving or retaining to himself and his heirs a right of way either in gross or as annexed to lands owned by him so as to charge the lands granted with such easement and servitude, as by a deed from the owner of the land to be charged, granting such way either in gross or as appurtenant to other estate of the grantee": *Bowen v. Conner*, 6 Cush. 137.

In the case of rights of *profit a prendre*, it seems to be held uniformly that, if enjoyed in connection with a certain estate, they are regarded as easements appurtenant thereto; but if granted to one in gross, they are treated as an estate or interest in land, and may be assignable or inheritable: *Post v. Pearsall*, 22 Wend. 425; Washburn on Easements, 7. The right to take water from a well or spring is held to be an interest in land, although not a *profit a prendre*, and may be claimed by custom: *Race v. Ward*, 4 El. & B. 702. And we are aware of no case which denies that the right to an aqueduct may be so created as to exist independently of any particular parcel of land owned by the grantee thereof, and be enjoyed by him and his heirs on any estate which he or they may own or acquire, and be capable of assignment or conveyance in gross. The water itself may not be the subject of property, but the right to take it, and to have pipes laid in the soil of another for that purpose, and to enter upon the land of another to lay, repair, and renew such pipes, is an interest in the realty, assignable, descendible, and devisable. On this subject, the language of Judge Curtis is as follows: "I know of no rule of the common law which prohibits grants of the incorporeal right to divert water from being made in gross. If I have a spring, I may sell the right to take water from it by pipes to one who does not own the land across which the pipes are to be carried, and I may either restrict the use to a particular house, or not, as I please. It is true, the grantee cannot make the grant useful without acquiring from the owner of the intermediate land the right to lay pipes therein, nor can he use the water in a house until he obtains the right to possess that house. But these may be acquired afterwards. Incorporeal rights may be inseparably annexed to a particular messuage or tract of land by the grant which creates them, and makes them incapable

of separate existence. But they may also be granted in gross, and afterwards, for purposes of enjoyment, be annexed to a messuage or land, and again severed therefrom by a conveyance of the messuage or land without the right, or a conveyance of the right without the land": *Lonsdale Co. v. Moies*, 21 Law Rep. 664; S. C., 1 Brun. Col. Cas. 655.

We have many cases in our own reports which recognize the right to take a certain quantity of water from a mill-pond as a distinct and substantive subject of grant, without restriction as to its use at any designated place. Rights of water duly granted by deed, not appurtenant to any particular parcel of land, may be used by the owner at any place or in any manner, so long as he does not interfere with or impair the rights of others: *De Witt v. Harvey*, 4 Gray, 486. We are unable to distinguish between the right to take water by a canal from a pond for the purposes of power, and the right to take it from a spring in a pipe for domestic purposes, the watering of cattle, to supply an artificial jet or fountain, and to sell it to others for any uses they may desire to make of it.

In the present case, it does not appear that the change in the direction or location of the pipe after it leaves the land of the defendant has increased the quantity of water taken from the spring. We are therefore of opinion that this action can be maintained; and the judge who presided at the trial in the superior court having ruled otherwise, the exceptions are sustained.

RESERVATION OF WATER RIGHT IN DEED: See *Hammond v. Woodman*, 66 Am. Dec. 219. That such reservation creates an independent right, see *Bash v. Miller*, 6 Fed. Rep. 550, citing the principal case.

GRAGG v. MARTIN.

[12 ALLEN, 498.]

ASSIGNMENT OF WAGES TO BE EARNED UNDER EXISTING CONTRACT IS VOID if made for the purpose of preventing their being attached by trustee process, notwithstanding the fact that the assignment was made openly and for a good consideration.

TRUSTEE process. The opinion states the facts.

S. O. Lamb, for the claimant.

S. T. Field, for the plaintiff.

By Court, HOAR, J. The principal defendant had assigned the wages which he expected to earn under an existing contract; and these being afterwards attached by the trustee process, the assignee came in as a claimant. The plaintiff alleged that the assignment was fraudulent against creditors, and made for the purpose of keeping the wages out of their reach. The claimant at the trial asked the court to rule that "future wages to be earned under an existing contract are not liable to an attachment; and an assignment of such wages made openly and for a good consideration is not fraudulent, although made for the purpose of keeping them out of the reach of creditors." The court declined so to rule, and to this refusal the claimant excepts.

The precise question thus presented does not seem to have been decided in this commonwealth, though in three adjudged cases it has been held that an assignment of future wages to be earned under a subsisting contract is valid, if not fraudulent: *Emery v. Lawrence*, 8 Cush. 151; *Lannan v. Smith*, 7 Gray, 150; *Boylan v. Leonard*, 2 Allen, 407. In the last case cited, it is said by Mr. Justice Dewey that "it would have been competent for the plaintiff in the superior court to deny that there was any adequate consideration for this assignment, or to show that the making of the assignment was fraudulent, and designed by the parties to cover the earnings of the assignor for his own use and benefit, and in fraud of his creditors"; but that was not a ground of the decision in the cause. The argument for the claimant is, that an intention to defraud is of no consequence, because no creditor could be defrauded by the assignment; that future earnings cannot be attached or taken in any manner in satisfaction of a debt, and therefore a creditor would have no interest to contest the validity of the assignment.

There would be force in this argument if the property or right of property conveyed could in no event be made available by creditors, as in the case of property exempted by law from attachment or compulsory appropriation for the discharge of debts. But at the time this trustee process was commenced, this fund was subject to attachment but for the assignment. There was no more impossibility that creditors should be defrauded than exists in any case where the fraud intended is against subsequent creditors. They are not creditors to be defrauded when the conveyance is made. Yet if the conveyance be made with the express intent to defraud them, and

the debtor afterwards contracts debts, the subsequent creditor may avoid the conveyance: *Clapp v. Leatherbee*, 18 Pick. 131, 138; *Parkman v. Welch*, 19 Pick. 231, 237. We think the dictum in *Boylan v. Leonard*, *supra*, a correct statement of the law.

The existence of a consideration for the conveyance or assignment, if an actual intent to defraud be established, will not make it valid: *Kimball v. Thompson*, 4 Cush. 441 [50 Am. Dec. 799].

The fact that the assignment was made "openly," though a circumstance indicating good faith, is certainly not conclusive against other evidence of fraud.

Exceptions overruled.

ASSIGNMENT OF FUTURE EARNINGS: See *Mulhall v. Quinn*, 61 Am. Dec. 414, and note; *Thayer v. Kelley*, 65 Id. 220; and see the principal case cited in *Cooper v. Ham*, 49 Ind. 401, to the point that future earnings cannot be assigned so as to avoid subjecting them to claims of existing creditors.

SMITH v. NEW HAVEN AND NORTHAMPTON R. R. Co.

[12 ALLEN, 581.]

RAILROAD COMPANY UNDERTAKING TO CARRY LIVE ANIMALS FOR HIRE is bound to provide cars of sufficient strength to prevent the animals from breaking through the same; and will be responsible for a loss occurring through failure to do so, although the animals were unruly and vicious; but not for an injury to the animals occurring simply from their own viciousness or unruliness, while being carried in a proper car.

MEASURE OF DAMAGES IN ACTION AGAINST COMMON CARRIER for failure to transport live animals to market and deliver them there in good condition on a certain day, in accordance with his undertaking, where such failure is attributable to a cause other than act of God or the public enemy, is the difference between their market value there in good condition on the day when they ought to have been delivered, and their market value there in their actual condition on the day when they were delivered.

CONTRACT. The opinion states the facts.

W. Allen, Jr., for the defendants.

C. Delano, for the plaintiff.

By Court, FOSTER, J. In this action, against a railroad company for injuries received by cattle while being transported to market, it appeared that when the train arrived at Westfield the barriers of a car door were found to be broken down, and three of the cattle were missing.

The defendants requested the presiding judge to rule that if the corporation used due care, and the injury was occasioned by the unruliness of the cattle, the plaintiff could not recover. This instruction was properly refused.

The common-law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. Upon undertaking their transportation, he assumes the obligation to deliver them safely against all contingencies, except such as would excuse the non-delivery of other property: *Wilson v. Hamilton*, 4 Ohio St. 722; *Palmer v. Grand Junction Ry*, 4 Mees. & W. 749; *White v. Winnisimmet Co.*, 7 Cush. 155.

To this general rule there is an apparent exception, supported by authority, and which we adopt, that the liability of the carrier does not extend to injuries caused by the peculiar character and propensities of the animals to themselves or each other. Perhaps this qualification is in principle only an application to live freight of the familiar rule which relieves the carrier from responsibility where fruit perishes by natural decay, or the inherent defects of merchandise destroy its value. Although the carrier insures the arrival of the property at the point of destination against everything but "the act of God and of public enemies," yet the condition in which it shall arrive there must depend on the nature of the article to be transported. He does not absolutely warrant live freight against the consequences of its own vitality: *Hall v. Renfro*, 3 Met. (Ky.) 51; *Clarke v. Rochester and Syracuse R. R.*, 14 N. Y. 570 [67 Am. Dec. 205].

Vicious and unruly animals may injure or destroy themselves or each other, or frightened animals may die of terror, or starve themselves by refusing food, notwithstanding every precaution it is possible to use. For such occurrences the carrier is not answerable. He will be relieved from responsibility for casualties of this description if he can show that he has provided all suitable means of transportation and exercised that degree of care which the nature of the property requires. In arrangements and precautions to guard against injuries occasioned by the faults and vices of animals to themselves or each other, the carrier is bound to use an amount of diligence analogous to that required of passenger carriers in the transportation of human beings. But the sufficiency of a car door to resist the struggles of animals, however unruly, it is in the power of a railroad company to secure. And its obligation in this respect is not satisfied by furnishing a reasonably strong

car. The company is bound to have one absolutely and actually sufficient. It is practicable to make a car so thoroughly strong that cattle cannot break it down and fall out. For any failure to do so, the carrier is responsible.

We should have no difficulty in sustaining the verdict for the plaintiff, were it not broadly and unqualifiedly stated in the instructions given that the defendant corporation was liable as a common carrier for injuries occasioned by the viciousness and unruly conduct of the cattle. So far as the sufficiency of the car was concerned, we assent to this statement. In its application to unavoidable injuries done by the cattle to themselves or each other, we regard it as incorrect.

There are two other qualifications of the liability of common carriers which may be referred to, not because of any fact appearing in the present case, but for completeness of statement, and to avoid misapprehension. Where the owner of animals or goods retains the custody of them during their transit, the carrier is not as absolutely liable as he otherwise would be: *White v. Winnisimmet Co.*, above cited. Also, where the owner of animals or other property is aware of any circumstances which render peculiar care and attention necessary to safe transportation, and which the carrier does not or is not presumed to know, he must give notice of such peculiarities, in order that suitable precautions may be employed: *Wilson v. Hamilton*, above cited.

Perhaps the facts at the trial furnished no room for the distinction in consequence of the omission of which we are constrained to set aside the present verdict. But of this we cannot be sure, and on that narrow ground only the exceptions are sustained.

The rule of damages was accurately stated. If, as we understand from the exceptions, the defendants received the cattle knowing that they were designed to reach New York in season for a particular market day, the loss sustained by wrongful delay in transportation is the difference in market value between the time when they ought to have arrived and when they actually did arrive at the terminus of the road. Whether without such knowledge, in a case of unreasonable detention or delay, the rule would not be the same, we need not now decide.

Exceptions sustained.

LIABILITY OF COMMON CARRIERS OF LIVE ANIMALS: See the extended note to *Clarks v. Rochester etc. R. R. Co.*, 67 Am. Dec. 208 et seq. The prin-

cial case is cited in *Squire v. New York Cent. R. R. Co.*, 95 Mass. 245. The court in that case say that the provision in carrier's contracts whereby the owner or shipper of live animals agrees to take the risk of injury to the animals in consequence of their own intrinsic defects makes the risk little, if any, different from that under the rule established by law in the absence of special provision in this regard.

MARKHAM v. RUSSELL.

[12 ALLEN, 578.]

IN ACTION FOR SLANDER, JURY ARE NOT RESTRICTED TO NOMINAL DAMAGES, although the slanderous words, which charged theft, were spoken in the presence of only a single witness, who testifies that they did not affect his opinion of the plaintiff, and that he still believed the plaintiff to be honest, if the words are shown to have been spoken maliciously.

IN SLANDER, EVIDENCE OF SIMILAR SLANDEROUS WORDS spoken on other previous occasions is admissible to show that the words which are the basis of the action were spoken with malice and ill will, and thereby to aggravate the damages.

TORT for slander in charging the plaintiff with theft. One Goff, who was called as a witness, testified that the words made the basis of the action were spoken by defendant in his presence; that no one else was present; that the words spoken by the defendant did not affect his opinion of the plaintiff, and that he still believed the plaintiff to be honest. For the purpose of proving malice, plaintiff, without objection, introduced evidence of other similar declarations by the defendant before and after those to Goff. The judge ruled that upon the evidence plaintiff could recover only nominal damages, and so instructed the jury, who returned a verdict according to the instructions for plaintiff for one dollar, whereupon plaintiff alleged exceptions.

E. D. Beach, for the plaintiff.

J. Wells and A. L. Soule, for the defendant.

By Court, BIGELOW, C. J. The effect of the ruling of the court was to withdraw from the consideration of the jury the question of damages. This was clearly erroneous. The evidence proved not only the utterance of slanderous words by the defendant, but also that they were spoken maliciously. Although it is true that no damages could be awarded for words spoken at any other time than that set forth in the

declaration, yet it is also true that proof of the utterance of such slanderous charges on other previous occasions was competent as showing that the words charged were spoken maliciously, and thus tended to aggravate the wrong and injury for which the plaintiff sought to recover compensation in this action. It certainly cannot be contended that words spoken with malice and ill will towards a party inflict no greater injury than those uttered innocently through mistake or with no purpose to traduce and defame character, and that they are to be measured with the same rule in estimating damages. Express malice aggravates the wrong done by the utterance of slanderous words. Nor can we think it sufficient reason for restricting a party to the recovery of nominal damages in an action like the present that the person to whom the words were spoken testifies that the character and reputation of the plaintiff was not impaired or injured in his estimation by the slanderous charges uttered by the defendant. It was for the jury to determine whether this statement was true, and if they believed it to its full extent, it did not necessarily lead to the conclusion that the plaintiff was entitled to merely nominal damages. Undoubtedly, the material element of damage in an action for slander is the injury done to character. But it is not the sole element. A jury have a right also to consider the mental suffering which may have been occasioned to a party by the publication of slanderous words. When an injury has been inflicted on the reputation of a party sufficient to sustain an action at all, he has a right to recover a reasonable compensation for the distress and anxiety which may have been the natural result of the legal wrong which has been done to him: 2 Greenl. Ev., sec. 267. In this case, it may be that the plaintiff had good reason for supposing that his reputation was injured in the opinion of the witness to whom the words were uttered, and he may have undergone great mental anxiety and distress by reason thereof.

In all trials at common law, a jury are the proper judges of the damages. It can rarely happen that the question can be rightly withdrawn from their consideration. It is only when a mere technical invasion of legal right is shown, unaccompanied by any actual injury to person or property, that the court is authorized to instruct them to return a verdict for nominal damages only. The case at bar did not fall within this category. *Sheffill v. Van Deusen*, 13 Gray, 304, presented a very different question. There the plaintiff failed to prove

any legal cause of action, and had no claim for damages, either nominal or substantial.

Exceptions sustained.

DAMAGES IN ACTION FOR SLANDER: See the extended note to *Terrilliger v. Woods*, 72 Am. Dec. 426 et seq.

HOLMES v. WAKEFIELD.

[12 ALLEN, 589.]

RAILROAD COMPANY IS LIABLE FOR ACT OF ONE OF ITS CONDUCTORS in improperly putting a person off a freight-car while the train is in motion, if it has instructed its conductors not to allow any person to ride in any freight-car attached to its train.

TORT against a railroad company and one Wakefield, for damages for personal injuries, the result of being put off a moving car by Wakefield, who was a conductor of the railroad company. The conductors had all received the instructions set out in the opinion, and Wakefield was acting in pursuance of such instructions. Plaintiff had got upon the train—a freight train—after it had started, and when the conductor told him to get off, he replied by offering his fare, but the conductor declined to take it, and pushed him so that he fell or jumped off the train and received the injury.

J. Wells and J. A. Rumrill, for the defendants.

H. B. Stevens, for the plaintiff.

By Court, HOAR, J. The general rule of law that where a master employs a servant to do an act which involves the use of force against the person or property of another, and the servant, in the course of his employment, uses force in a manner or to an extent unlawful and unjustifiable, both are answerable as trespassers, has been settled in this commonwealth in the cases of *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465 [64 Am. Dec. 83], and *Hewitt v. Swift*, 3 Allen, 420. It was admitted that the defendant Wakefield was the conductor in charge of the train; and the only question, therefore, is, whether he was in the execution of the duty required of him by the regulations of the corporation when he caused the plaintiff to leave the cars. Among the "special instructions" given him by the railroad superintendent was this: "The conductors will not allow any person to ride in any freight-car attached to

their train." The defendants argue that this direction was intended as a security for the freight; that the conductor had no charge of passengers; and that, at the utmost, it only authorized him to prevent persons from getting on to the cars, and did not require him to remove them, especially after the train was in motion.

But we do not think the effect of the instruction can be so limited. It plainly made it his duty to prevent any person riding on a freight-car. This he might do in any lawful and proper manner,—by the use of reasonable force to prevent getting upon the car, or in removing a person who had got upon the car in violation of the rule. The wrong to the plaintiff consisted in using force unreasonably; that is, at a time and under circumstances which made it dangerous to his life or limb. A test of this may be found by inquiring whether the plaintiff could have maintained his action against Wakefield merely for ejecting him from the car, without proof of personal injury; and we think it clear that he could not. The ruling at the trial was therefore right, and the case falls within the principle of the decisions before cited.

Exceptions overruled.

EXPULSION OF PERSON FROM MOVING TRAIN: See the note to *Chicago etc. R. R. Co. v. Parks*, 68 Am. Dec. 572, 573.

RAILROAD COMPANY IS LIABLE TO SAME EXTENT as individual for injury done by servant in the course of his employment: See *Moore v. Fitchburg R. R. Co.*, 64 Am. Dec. 83, and *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 126; *Indianapolis P. & O. Ry Co. v. Anthony*, 43 Id. 188, and *Mulchey v. Methodist Reliq. Soc.*, 125 Mass. 490, citing the principal case.

MERRIFIELD v. LOMBARD.

[18 ALLEN, MA.]

RIPARIAN RIGHTS.—Any user of a stream by an upper proprietor which substantially diminishes its volume, or defiles or corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, is improper, and will be enjoined.

UPPER PROPRIETOR WILL BE ENJOINED FROM CONDUCTING POISONOUS OR CORROSIVE SUBSTANCES INTO STREAM, causing injury or damage to a lower proprietor's machinery.

THE opinion states the case.

W. Brigham, for the plaintiff.

E. B. Stoddard, for the defendant.

By Court, BIGELOW, C. J. The case as made by the bill, answer, and agreed facts establishes a clear invasion of the plaintiff's right by the defendant. The law requires of a party through whose land a natural watercourse passes that he should use the water in such manner as not to destroy, impair, or materially affect the beneficial appropriation of it by the proprietors of land below on the same stream. Each riparian owner has the right to use the water for any reasonable and proper purpose as it flows through his land, subject to the restriction that he shall not thereby deprive others of a like use and enjoyment of the stream as it runs through their land. Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow *ut currere solebat*, or which defiles and corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the right of other owners of land through which a watercourse runs, and creates a nuisance for which those thereby injured are entitled to a remedy. An injury to the purity or quality of the water to the detriment of other riparian owners constitutes in legal effect a wrong and an invasion of private right in like manner as a permanent obstruction or diversion of the water. It tends directly to impair and destroy the use of the stream by others for reasonable and proper purposes: *Mason v. Hill*, 2 Nev. & M. 747; S. C., 5 Barn. & Adol. 1; *Wood v. Waud*, 13 Jur. 472; S. C., 3 Ex. 748; 3 Kent's Com., 6th ed., 439; Angell on Watercourses, sec. 136.

It is conceded in the present case that by the mode in which the defendant conducts his business a large quantity of poisonous and corrosive substances is permitted to run into the water of the stream on which the plaintiff's and defendant's manufactories are both situated, which defiles and corrupts the water to such an extent that the machinery of the plaintiff is corroded and destroyed, and the use of the water for reasonable and proper purposes is impaired and prevented. We know of no rule or principle of law by which such a mode of appropriation of a running stream, in the absence of any proof of a paramount right or title, can be justified or excused as against a riparian owner of land on the same stream below. No fact appears in this case from which any right by grant,

prescription, or adverse use is shown to exist, by virtue of which the defendant can claim to use the stream otherwise than as a riparian owner entitled to the natural and ordinary rights and privileges which usually and legally attach and belong to the owner of land on the banks of a watercourse. It is clear, therefore, that he has been guilty of an infraction of the plaintiff's rights.

The right of the latter to equitable relief is clear and unquestionable. The acts of the defendant tend to create a nuisance of a continuous and constantly accruing nature, for which an action of law can furnish no adequate relief: *Angell on Watercourses*, secs. 444-446; *Bemis v. Upham*, 18 Pick. 169; *Hill v. Sayles*, 12 Cush. 454.

Perpetual injunction granted.

RIPIARIAN RIGHTS: See the law upon this question discussed in *Dilling v. Murray*, 63 Am. Dec. 385; *Tillotson v. Smith*, 64 Id. 355; *Wheatley v. Christman*, 64 Id. 657; *Burwell v. Hobson*, 65 Id. 247; *Stein v. Burden*, 65 Id. 394; *Davis v. Getchell*, 79 Id. 636, and notes.

THE PRINCIPAL CASE IS CITED upon this point in *Merrifield v. Worcester*, 110 Mass. 220, and in *Dwight Printing Co. v. Boston*, 122 Id. 583-589.

ELA v. EDWARDS.

[18 ALLEN, 48.]

ALLOWANCE BY PROBATE COURT OF ANOTHER STATE OF CLAIM OF ANCILLARY ADMINISTRATOR THERE, resident of this state, which allowance was greater than the assets in his hands, is not conclusive upon the heirs here.

THE opinion states the point.

Dewey, for the appellant.

Rice, for the appellee.

By Court, HOAR, J. We are unable to find any just ground of distinction between the principles which must govern this case and those which determined the decision in *Low v. Bartlett*, 8 Allen, 259. It was there held that there is no such privity between an executor in this commonwealth and an ancillary administrator appointed in another state as would enable a creditor of the testator who had obtained a judgment against the administrator there to enforce it against the executor in Massachusetts. The distinction which the appellant makes is, that in the case at bar the executor and the adminis-

trator are the same person. But the item which he asks to be allowed in his account, which is the balance due him on the settlement of his account as administrator in New Hampshire, is created by the allowance there of a debt which he proved against the estate. That allowance established a claim in his own favor against the assets in that jurisdiction. But the creditors and legatees here are certainly not bound by it. They were under no obligation to go there to contest it. The New Hampshire court had no jurisdiction over it for the purpose of binding the assets in Massachusetts.

Decree of the judge of probate affirmed.

ALLOWANCE OF CLAIM, UPON WHOM BINDING: See note to *Moore v. Hillsbrant*, 65 Am. Dec. 124.

THE PRINCIPAL CASE IS CITED to the point that a foreign adjudication of a claim presented to an administrator here is not binding upon him in *Clark v. Blackington*, 110 Mass. 369-373; and in *Merrill v. New England Ins. Co.*, 103 Id. 249, to the point that an administrator in this state and in another state are not only different persons, but are not in privity with each other. The case of *Low v. Bartlett*, 8 Allen, 259, referred to in the opinion as decisive of the principal case, was decided by Justice Chapman in January, 1864. The facts of the case, as stated by the court, are briefly as follows: B. B. Mussey died in Boston, Massachusetts, in 1857, and Bartlett was appointed executor of his last will and testament. Mussey also left property in Vermont, and at Bartlett's request letters of administration were taken out in that state by a man named Bradford. Plaintiff is a resident of Vermont, and presented his claim against the deceased to the administrator, by whom it was disallowed. He then commenced suit, which was defended at the request of Bartlett, was continued in court for a long time, and was finally decided for plaintiff by the supreme court. At this time, however, the estate in Massachusetts had been settled, and the estate in Vermont proved insufficient to satisfy his judgment. In this proceeding, he alleged that he had presented his claims to Bartlett, who refused to pay them; that he finds that the time for presenting claims and bringing suits against the executor has expired, and that he had supposed that the estate would be kept open, and that the estate in Vermont would be sufficient to pay his claims. He therefore seeks to recover the balance due him by this proceeding in equity out of the funds in the hands of the trustees, to whom it had been distributed, notwithstanding the statute of limitations. The court said: "His position is, that as his original claim was merged in the judgment obtained in Vermont against the administrator there, the present claim is a new one, which has arisen since the death of the testator; and that there is such a privity between the executor here and the administrator there that his judgment can be enforced here in equity. Since it is conceded that without that judgment the claim would be barred here by the statute which limits actions against executors to two years, the first question to be asked is, whether the judgment has any validity against the executor.

"If we look at the question of privity between the executor here and the ancillary administrator in Vermont, it is difficult to find any valid ground on which such privity can rest. The executor derives his authority from the

letters testamentary issued by the probate court here; he gives bond to that court, is accountable to it for all his proceedings, makes his final settlement in it, and is discharged by it in conformity with the statutes of this commonwealth. The administrator derives his authority from the probate court in Vermont, and is accountable to it in the same manner in which the executor is accountable in our court. The authority of the executor does not extend to the property there, nor to the doings of the administrator. Nor does the authority of the administrator extend to the property here, nor to the doings of the executor. When the plaintiff commenced his suit against the administrator, the executor had no right to go there and defend it. If he had been found in Vermont, he could not have been sued there. The judgment rendered in the suit was not against him, or against the testator's goods in his hands, but was against the administrator and the testator's goods in his hands. The courts in Vermont had no jurisdiction of the executor, or of the goods in hands, any more than our courts would have over the administrator and the goods in his hands. It is this limitation of state jurisdiction that creates a necessity for an administration in every state where a deceased person leaves property; and each state regulates for itself exclusively the manner in which the estate found within its limits shall be settled. If, after payment of debts and expenses in Vermont, there had been a surplus remaining in the hands of the administrator, the probate court would have ordered him to pay it over to the executor; and the only way in which the executor and administrator could have any dealings with each other would be under such an order. It is in effect the only way in which they could know each other officially. As there was in fact no surplus, they have nothing to do with each other. They have, therefore, not one of the direct relations to each other which enter into the idea of privity. But it is said that they are in privity with the testator, and that this creates a privity of estate between them. It is true that the executor is in privity with the testator in respect to the estate which he takes, which is merely the estate in Massachusetts, and within the jurisdiction of its courts; and the administrator is in privity with him in respect to the estate in Vermont, which he can administer upon. But as the privity relates to different property and different matters, and is limited to different jurisdictions, it does not aid the plaintiff. There is no privity between the estate in the hands of the executor and that in the hands of the administrator. Each must be administered separately and independently. Nor is there any need of such a doctrine of privity as the plaintiff contends for. The plaintiff might have prosecuted his original claim here at the same time that he was prosecuting it in Vermont; so that he was under no necessity to wait till it was barred by our statute of limitations relating to suits against executors and administrators. There would therefore be no equity in setting aside the statute of limitations in his favor, even if we had power to do so. On the other hand, it would be very inequitable to permit him to prosecute his suit in another jurisdiction, where the executor could not defend against it, and then, after the estate in Massachusetts had been settled, and the time of limitation had expired, revive the liability of the executor because of the foreign judgment thus obtained. Statutes of limitation bind courts of equity as well as courts of law; and in this case the executor not only has a right to its protection, but is bound to avail himself of it. Another and a decisive objection to the plaintiff's position is, that if it were held to be valid, it would enable the foreign administrator to bind the estate in Massachusetts by suffering the recovery of a judgment against him."

The court concludes by reviewing, and declaring to be in harmony with his opinion, the cases of *Hill v. Tucker*, 13 How. 458; *Aspden v. Nixon*, 4 Id. 467; *Stacy v. Thrasher*, 6 Id. 44; *McLean v. Meek*, 18 Id. 16; *Brodie v. Bickley*, 2 Rawle, 431; *Boston v. Boylston*, 2 Mass. 384; *Goodwin v. Jones*, 3 Id. 514; S. C., 3 Am. Dec. 173; *Grout v. Chamberlin*, 4 Mass. 611; *Borden v. Borden*, 5 Id. 77; S. C., 4 Am. Dec. 32; *Langdon v. Potter*, 11 Mass. 313; *Talmage v. Chapel*, 16 Id. 71; *Fay v. Haven*, 3 Met. 109; *Wheelock v. Pierce*, 6 Cush. 288; and *Norton v. Palmer*, 7 Id. 523.

DAVIS AND WIFE v. WETHERELL.

[18 ALLEN, 60.]

PLEADING HOMESTEAD IN BILL TO REDEEM. — Where plaintiff claiming a homestead interest seeks to redeem, and alleges in his bill that the premises were a part of his homestead farm, though separated from his dwelling by lands of another, and that he acquired an estate of homestead in the premises under the statute, the pleading is good.

INCHOATE RIGHT OF DOWER IN WIFE IS SUFFICIENT ESTATE TO ENTITLE HER TO MAINTAIN BILL IN EQUITY to redeem lands from a mortgage in which she had joined with her husband.

BILL to redeem. The bill alleged the making of a mortgage by Samuel Davis and his wife; that the mortgagee assigned it to Wetherell, who in due time foreclosed the same; that Wetherell afterwards executed a quitclaim deed to the other defendant of all his interest in the premises; and that both defendants have been in possession, taking rents and profits; that the premises were part of the homestead farm of Davis, although separated by other lands belonging to strangers from the portion of his farm upon which his dwelling-house and barn were situated; that said premises were purchased by Davis after the other portion of his farm, and was a half-mile distant therefrom; that he used and cultivated said premises in connection with his other premises for raising hay and pasturing cattle; also that he acquired a homestead in the premises under the provisions of the statute, that he was entitled to have such homestead set off to him as against every person except the mortgagees, and that his wife was entitled to dower therein, save as to the mortgagees, in case she survived her husband. Defendants demurred to this bill.

P. C. Bacon, for the defendants.

T. L. Nelson, for the plaintiffs.

By Court, *HOAR, J.* The questions presented for decision upon the argument of the demurrer are only these: 1. Whether

the husband, Samuel Davis, is entitled to maintain a bill to redeem by reason of a homestead estate in the equity of redemption under Statutes of 1855, c. 238; and 2. Whether his wife, who joins in the bill, is entitled to redeem by virtue of her inchoate right of dower in the equity, she having joined with her husband in executing the mortgage.

Upon the first question, the court are of opinion that the rights of the parties cannot be conclusively settled upon demurrer. The bill contains the distinct averment that the parcel of land described in the mortgage is a part of the farm occupied and used as a residence by the said Davis as a householder with a family, and that he was entitled to a homestead in the equity of redemption thereof. As a matter of pleading, the allegation seems to be sufficient. Whether upon the proofs the allegation will be sustained, or whether the case will fall within the rule adopted in *Adams v. Jenkins*, 16 Gray, 146, we cannot now determine.

The other question is new and interesting, and nothing has been found in the way of direct authority which bears upon it. That a widow is dowable of an equity of redemption is well settled,—indeed, is especially provided by statute: Gen. Stats., c. 90, sec. 2. But no adjudged case has been found in which a wife having an inchoate right of dower has been allowed to redeem from a mortgage in which she had joined with her husband. Before the Revised Statutes, it would seem that if the mortgagee or his assigns had purchased the husband's equity of redemption, he could not cut off the wife's right of dower in the equity by a foreclosure until after the husband's death: *Lund v. Woods*, 11 Met. 566. But since the Revised Statutes, it has been repeatedly determined that the foreclosure, in the mode provided by statute, of a mortgage in which the wife had joined to release her dower, or in case the husband had only been seised of an equity of redemption during the coverture, would bar the right of dower. And in a suit against the husband to foreclose, the wife need not be made a party: *Wedge v. Moore*, 6 Cush. 8; *Savage v. Hall*, 12 Gray, 363; *Farwell v. Cotting*, 8 Allen, 211; *Pitts v. Aldrich*, 11 Id. 39.

Upon general principles of equity, it is difficult to find a reason why an inchoate right of dower should not be protected against extinguishment by the foreclosure of a mortgage; especially where the husband has parted with his whole estate in the land, and can no longer be regarded as in any sense

representing the interests of the wife. Coverture is no bar to the maintenance of a suit in equity; and it is the policy of our legislation to permit married women to assert, protect, and sue for their separate rights of property. By General Statutes, c. 140, sec. 13, the right of redeeming a mortgage is given to "the mortgagor or any person lawfully claiming or holding under him." A woman entitled to an inchoate right of dower cannot be regarded as "holding" under her husband, as she certainly has no estate in possession. But she may well enough be considered as "claiming" under him. When her dower is assigned, her estate is a continuance of her husband's. Her inchoate right of dower is a right of a very peculiar nature. It is a right of which nothing but her death or voluntary act can deprive her, and so it is something more than a mere possibility. Ordinary statutes of limitation do not run against it, so that adverse possession as against her husband will not deprive her of it. And although she cannot convey or alienate it, except by joining in a deed with her husband to release it, and cannot protect it from waste, and it is not liable to be taken by legal process, yet her husband cannot bar or encumber it. As was said by Chief Justice Parker in *Bullard v. Briggs*, 7 Pick. 533 [19 Am. Dec. 292], it is "a valuable interest, which is frequently the subject of contract and bargain. . . . It is more than a possibility, and may well be denominated a contingent interest." In that case, it was held that where a wife joined with her husband in releasing her dower to a mortgagee, and the husband in consideration of such release conveyed the equity of redemption to a trustee for her benefit, the conveyance could not be avoided by his creditors if the value of the dower was equal to that of the equity conveyed.

In *Bacon v. Bowdoin*, 22 Pick. 401, it was decided that a tenant for years, or even the owner of a mere easement in land, might bring a bill to redeem a mortgage. And we think it could not be doubted that the owner of a life estate in remainder, or other contingent estate, might redeem. After the death of the husband, and before assignment of dower, the widow has no estate which she can enter upon or convey; yet undoubtedly she has an interest sufficient to support a suit for redemption: *Eaton v. Simonds*, 14 Pick. 98; *Farwell v. Cotting*, 8 Allen, 211.

In *Burns v. Lynde*, 6 Allen, 305, a wife having an inchoate right of dower was allowed to maintain a suit in equity to set aside a deed purporting to release her dower, which had been

executed by her in blank, and afterwards filled up; and a decree was made for a reconveyance to her of the right of dower by the grantee in the deed. That case goes very far in principle to sustain the conclusion to which we have come in the case at bar.

And we are all of opinion that the female plaintiff, having a valuable interest in the mortgaged premises in privity with the mortgagor,—an interest which she might have released to the assignee of the equity of redemption for a pecuniary consideration perhaps of considerable amount, and of which she would be deprived by a foreclosure of the mortgage,—is entitled to maintain her bill.

For the reasons stated in *Brown v. Lapham*, 3 Cush. 551, we think there was no merger of the equitable in the legal title, and that the defendant may have the full benefit of the assignment of the mortgage.

If she shall elect to receive the whole amount due on the mortgage, preferring the surrender of her equity of redemption to contribution, she may do so; and Mrs. Davis, on payment of that sum, will hold a valid title as assignee of the mortgage. If a question as to the proportion in which the respective interests are to contribute shall hereafter arise, some mode by which their proportionate value can be ascertained must then be adopted. It does not arise upon the demurrer.

Demurrer overruled.

HOMESTEAD CHARACTER DOES NOT ATTACH TO PROPERTY until it is actually occupied as a home, and a mere intention to occupy, though subsequently carried out, is not sufficient: *Christy v. Dyer*, 81 Am. Dec. 493. Homestead claim may include several contiguous lots, provided they do not exceed in value the amount allowed by the homestead law: *McDonald v. Badger*, 83 Id. 123. Actual residence is requisite to protect homestead from sale under execution, as a general rule, although it is not essential under all circumstances: *Cabeen v. Mulligan*, 87 Id. 247; *Tillotson v. Millard*, 82 Id. 112. Improvement of adjoining tract of land as part of the homestead gives it that character: *Fyffe v. Beers*, 85 Id. 577.

THE PRINCIPAL CASE IS CITED to the point that a wife's right of dower has been held sufficient to entitle her to maintain a bill to redeem, in *Greiser v. Klein*, 28 Mich. 16. It is cited and distinguished upon this point, and its doctrine extensively discussed, in *Fletcher v. Holmes*, 38 Ind. 497-537.

WESSON v. WASHBURN IRON COMPANY.

[13 ALLEN, 95.]

EVIDENCE. — IN ACTION AGAINST PROPRIETORS OF LARGE ROLLING-MILLS AND MACHINERY FOR DAMAGES TO PLAINTIFF'S HOTEL by covering the same with smoke and cinders, and jarring and shaking the building, rendering living or sleeping therein almost impossible, it would be competent to prove by direct evidence that lodgers in the hotel were induced to leave by reason of these acts of defendants; but the declarations of guests who were coming down from their rooms on their way to another hotel, that they were leaving on account of the noise, shaking, and smoke, is incompetent for that purpose.

EVIDENCE. — TESTIMONY OF EXPERTS IN REAL ESTATE VALUES that the stoppage of defendant's works would materially diminish the value of plaintiff's property, in an action against the owners of a large mill for maintaining a nuisance by operating their works, is inadmissible, although plaintiff has introduced evidence to the effect that the operation of their works has reduced the rental value of her property.

PRIVATE ACTION FOR NUISANCE GENERAL IN ITS OPERATION. — Action will lie against owners of a mill for injuring plaintiff's dwelling by shaking and jarring the same, and surrounding it with noisome odors and vapors, although all the other residents of that locality have suffered like injury. The rule that where the right invaded or impaired is a common and public one, which every subject of the state may use and enjoy, an individual action does not lie, does not apply to cases where the alleged wrong is done to private property, or the health of individuals is injured or their comfort destroyed by the carrying on of offensive trades or the creation of noisome smells or disturbing noises, no matter how extensive or numerous may be the instances of discomfort or injury to persons or property thereby occasioned.

TORT, the complaint containing two counts. The first alleged that plaintiff was the owner of a dwelling-house contiguous to the land and buildings of defendants, and that her house was used as a dwelling-house for her tenants; that defendants wrongfully maintained a rolling-mill and foundry on their land, which they used for the manufacture of railroad iron and other articles manufactured from iron and steel; that they operated large stationary engines, trip-hammers, rolling-mills, and other machinery, and furnaces for melting iron, etc.; that these engines, machinery, and hammers were operated by night as well as by day, and that by their action the dwelling-house and ground of plaintiff was greatly jarred and shaken; and that by reason thereof the house was rendered uncomfortable, unfit for habitation, and of no value. The second count related to damages to another of plaintiff's houses, used as an inn, tavern, or hotel. In addition to the charges made in the first count, plaintiff alleged that defendants consumed large quantities of coal, which occasioned large

quantities of coal dust, smoke, and ashes, noisome and offensive, to rise and settle and diffuse themselves over and through plaintiff's premises, rendering the same unfit for habitation, and depriving her of the gains of running and operating the same. The answer contained a general denial. At the trial, plaintiff gave evidence showing that during the period complained of large quantities of smoke, cinders, and dust came constantly from the works of defendant into plaintiff's houses, making them black outside and in, covering the bed-clothing and table-cloth with dust, and that when the wind was east the effect was suffocating; that the trip-hammer struck a blow of from seventy-five to one hundred tons, and was kept running night and day; that it shook the houses, caused plastering to crack and fall down, and that no clock would run in the houses; that the house which had been used as a hotel had to be abandoned for that purpose, except that guests were occasionally received, who after going to bed had frequently come down late at night and gone to another hotel. Plaintiff then offered to show that these guests said, on coming down stairs with their carpet-bags, that they could not stay because they could not sleep on account of the jar; but the evidence was not admitted. Plaintiff introduced evidence tending to show that the operation of defendant's works had decreased the rental value of her property and its value for occupation. Defendant produced several witnesses who testified that they were familiar with the locality where the parties resided, had bought and sold real estate in that vicinity, and were acquainted with land values there. These witnesses were allowed to answer, over the objection of plaintiff, what would have been the effect of the stoppage of the works of the defendants upon the value for occupation of the houses of the plaintiff during the time complained of. The remainder of the case appears from the opinion.

Hoar and Verry, for the plaintiff.

Dewey and Stoddard, for the defendants.

By Court, BIGELOW, C. J. Two objections to the rulings of the court relative to the competency of evidence are now insisted on.

1. It appeared at the trial that one of the plaintiff's houses which was alleged to have been injured by the acts of the defendants had been used as an inn; and that persons who had been received there as guests sometimes came down from their

lodging-rooms at a late hour of the night and went to another inn. The plaintiff offered to prove the reasons assigned by these guests while they were coming down stairs for abandoning their rooms and seeking lodgings elsewhere. This evidence was rejected, and we are of opinion that it was incompetent. The statements were not of a nature to explain or give character to the act which they accompanied. They were merely declarations of a previously existing fact or state of things which operated on the minds of the persons who uttered them, and induced them to leave the house; but they had no tendency whatever to show that this act, of itself clear and unequivocal, should have any different signification or effect than that which should be given to it if proved as an independent fact irrespectively of the statements which accompanied it. The declarations were therefore hearsay evidence, and although it would have been competent to show by direct proof of the fact that lodgers in the house were disturbed, and induced to leave it by reason of the acts of the defendants, it could not be shown by their statements to third persons: *Nutting v. Page*, 4 Gray, 584.

2. The other objection to the competency of evidence presents a question of more difficulty. But upon consideration, we think that the opinions of witnesses as to the effect of the discontinuance of the defendants' works on the value for occupation of the plaintiff's houses were too speculative and conjectural to be admissible as coming within the range allowed to the testimony of experts. It is to be observed that the question put to the witnesses was not as to the actual present value of property, or as to the extent of damage already actually done by the acts of the defendants, as in *Vandine v. Burpee*, 13 Met. 288 [46 Am. Dec. 733]; but the inquiry was directed to the probable damage which would ensue to the plaintiff's property in the happening of a contingency which might never occur. In *Call v. Allen*, 1 Allen, 137, it was proved that the plaintiff had actually lost tenants by the existence of the alleged nuisance, and that his property had thereby become reduced in value. In reply to this evidence, the defendant was permitted to show that the discontinuance of his works would cause the removal of a certain class of tenants from the neighborhood, and thereby operate to diminish the rentable value of the plaintiff's houses. But the inquiry did not extend further, as in the case at bar, so as to embrace the mere abstract opinions of

witnesses concerning the extent of such diminution by the introduction of estimates founded on a mere conjectural basis.

3. The more interesting question remains to be considered, whether the instructions under which the case was submitted to the jury were correct and appropriate to the facts in proof.

There can be no doubt of the truth of the general principle stated by the court, that a nuisance may exist which occasions an injury to an individual for which an action cannot be maintained in his favor unless he can show some special damage in his person or property differing in kind and degree from that which is sustained by other persons who are subjected to inconvenience and injury from the same cause. The difficulty lies in the application of this principle. The true limit, as we understand it, within which its operation is allowed is to be found in the nature of the nuisance which is the subject of complaint. If the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy,—such as the use of a highway, or canal, or public landing-place, or a common watering-place on a stream or pond of water,—in all such cases a mere deprivation or obstruction of the use which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no valid cause of action in favor of an individual, although he may suffer inconvenience or delay greater in degree than others from the alleged obstruction or hindrance. The private injury in this class of cases is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private individuals. Several instances of the application of this rule are to be found in our own reports: *Stetson v. Faxon*, 19 Pick. 147 [31 Am. Dec. 123]; *Thayer v. Boston*, 19 Id. 511, 514 [31 Am. Dec. 157]; *Quincy Canal v. Newcomb*, 7 Met. 276, 283; *Holman v. Townsend*, 13 Id. 297, 299; *Smith v. Boston*, 7 Cush. 254; *Brainard v. Connecticut River R. R.*, 7 Id. 506, 511; *Blood v. Nashua and Lowell R. R.*, 2 Gray, 140 [61 Am. Dec. 444]; *Brightman v. Fairhaven*, 7 Id. 271; *Harvard College v. Stearns*, 15 Id. 1; *Willard v. Cambridge*, 3 Allen, 574; *Hartshorn v. South Reading*, 3 Id. 501; *Fall River Iron Works Co. v. Old Colony and Fall River R. R.*, 5 Id. 224.

But it will be found that in all these cases, and in others in

which the same principle has been laid down, it has been applied to that class of nuisances which have caused a hindrance or obstruction in the exercise of a right which is common to every person in the community, and that it has never been extended to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their peace and comfort in their dwellings is impaired, by the carrying on of offensive trades and occupations which create noisome smells or disturbing noises, or cause other annoyances and injuries to persons and property in the vicinity, however numerous or extensive may be the instances of discomfort, inconvenience, and injury to persons and property thereby occasioned. Where a public right or privilege common to every person in the community is interrupted or interfered with, a nuisance is created by the very act of interruption or interference which subjects the party through whose agency it is done to a public prosecution, although no actual injury or damage may be thereby caused to any one. If, for example, a public way is obstructed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary in a prosecution for such a nuisance to show that any one had been delayed or turned aside. The offense would be complete although during the continuance of the obstruction no one had had occasion to pass over the way. The wrong consists in doing an act inconsistent with and in derogation of the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown, distinct not only in degree, but in kind, from that which is done to the whole public by the nuisance.

But there is another class of cases, in which the essence of the wrong consists in an invasion of private right, and in which the public offense is committed, not merely by doing an act which causes injury, annoyance, and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this

character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act.

Nor would such a doctrine be consistent with sound principle. Carried out practically, it would deprive persons of all redress for injury to property or health, or for personal annoyance and discomfort, in all cases where the nuisance was so general and extensive as to be a legitimate subject of a public prosecution; so that in effect a wrong-doer would escape all liability to make indemnity for private injuries by carrying on an offensive trade or occupation in such place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance.

The real distinction would seem to be this: that when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case, the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. This, we think, is substantially the conclusion to be derived from a careful examination of the adjudged cases. The apparent conflict between them can be reconciled on the ground that an injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar, and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause. Certainly, multiplicity of actions affords no good reason for denying a person all remedy for actual loss and injury which he may sustain in his person or property by the unlawful acts of another, although it may be a valid ground for refusing redress to individuals for a mere invasion of a common and public right.

The rule of law is well settled and familiar that every man

is bound to use his own property in such manner as not to injure the property of another, or the reasonable and proper enjoyment of it; and that the carrying on of an offensive trade or business, which creates noisome smells and noxious vapors, or causes great and disturbing noises, or which otherwise renders the occupation of property in the vicinity inconvenient and uncomfortable, is a nuisance for which any person whose property is damaged, or whose health is injured, or whose reasonable enjoyment of his estate as a place of residence is impaired or destroyed thereby, may well maintain an action to recover compensation for the injury. The limitations proper to be made in the application of this rule are accurately stated in *Bamford v. Turnley*, 3 Best & S. 66; and in *Tipping v. St. Helen's Smelting Co.*, 6 Id. 608-616; S. C., 11 H. L. Cas. 642, and cases there cited. See also, in addition to cases cited by the counsel for the plaintiff, *Spencer v. London and Birmingham R'y*, 8 Sim. 193; *Soltau v. De Held*, 2 Sim., N. S., 133.

The instructions given to the jury were stated in such form as to lead them to infer that this action could not be maintained if it appeared that other owners of property in that neighborhood suffered injury and damage similar to that which was sustained by the plaintiff in her estate by the acts of the defendants. This, as applied to the facts in proof, was an error, and renders it necessary that the case should be tried anew.

Exceptions sustained.

BUSINESS OF BLACKSMITH MUST BE CARRIED ON SO AS NOT TO INJURE OTHERS; and it is a nuisance where it is carried on in a shop twelve feet distant from a hotel, and causes, by reason of the cinders, dust, and ashes arising from the shop, serious annoyance and inconvenience to the guests of the hotel, and consequent loss to the hotel-owner: *Norcross v. Thoms*, 81 Am. Dec. 588. Chancery will enjoin the prosecution of a legal trade where it is carried on in such a manner as to injure an adjoining tenement, or to affect the air with noisome smells, gases, or smoke, injurious to health, or rendering life in the neighborhood unsafe or uncomfortable: *Wolcott v. Melick*, 66 Id. 790.

EVIDENCE. — NUISANCE AS IN PRINCIPAL CASE, HOW PROVEN: See *Kearney v. Farrell*, 73 Am. Dec. 677, and note. In this case, proof of declarations of deceased wife was held competent to show that she complained of offensive smells from nuisance while suffering from them, and during the time mentioned in the declaration; the witnesses testifying that the offensive smells were also perceived by them.

DECLARATIONS AS EVIDENCE: See a general discussion of this topic in *Printup v. Mitchell*, 63 Am. Dec. 258; *McDowell v. Goldsmith*, 61 Id. 306; *Frink v. Coo*, 61 Id. 141, and note.

EXPERT EVIDENCE. — The law relating to expert testimony is discussed at length in the note to *Hammond v. Woodman*, 66 Am. Dec. 219; see also *Atlantic etc. R. R. Co. v. Campbell*, 64 Id. 607; *Newark v. Liverpool etc. Ins. Co.*, 77 Id. 608.

PRIVATE ACTION FOR PUBLIC NUISANCE. — Party injured by nuisance may recover compensation in civil suit upon proof of special and peculiar damage to himself, though the nuisance be public, rendering the guilty party liable to indictment: *Norcross v. Thoms*, 81 Am. Dec. 588. One who suffers special injury from public nuisance is entitled to have it restrained by injunction: *Milbau v. Sharp*, 84 Id. 314; but equity will not interfere in such a case except where there is special and serious injury to the complainant distinct from that suffered by the public at large: *Hinchman v. Patterson Horse R. R. Co.*, 86 Id. 252; see notes to these cases.

THE PRINCIPAL CASE IS CITED, where certain special injuries sustained by plaintiff were held not to be merged in the common nuisance suffered by the community, and that he had an individual action, in *Hasbrell v. New Bedford*, 106 Mass. 208-216; *Allen v. Charlestown*, 109 Id. 243-247; *Brewer v. Boston etc. R. R. Co.*, 113 Id. 52-58; and *Attorney-General v. Salem*, 103 Id. 138. It is cited and distinguished upon this point in *Blackwell v. Old Colony R. R. Co.*, 122 Id. 1. It is cited in *Burt v. Wigglesworth*, 117 Id. 306, to the point that testimony as to what would be a fair rental value of the lot in question with a suitable building upon it related to mere matter of opinion as to the future, not of present fact, and was too prospective and indefinite in its nature to be competent evidence of the present value of the land not built upon. It is again cited and distinguished, upon the question of liability for damages in the use of property, in *Walker v. Old Colony etc. R. R. Co.*, 103 Id. 14.

LYNDE v. MCGREGOR.

[18 ALLEN, 182.]

WHERE WIFE MORTGAGES HER SEPARATE ESTATE TO RAISE MONEY FOR HER INSOLVENT HUSBAND, NOT KNOWING HIM TO BE SUCH, and where he fraudulently and with intent to defraud his creditors, and collusively with the mortgagee, spends large sums of money in building upon and improving his wife's land, the husband's assignee in insolvency cannot recover from her for sums of money so expended within the amount of the mortgage, but can recover for other sums expended, and which increased the value of the land, but only to the extent of such increase.

ANSWERS OF WITNESS IN WRITING, UNDER OATH, MADE AT PREVIOUS EXAMINATION, ARE ADMISSIBLE AGAINST him in a subsequent proceeding, although not signed by him, and with the understanding that they were first to be submitted to his attorney for correction before signing and filing.

BOARDMAN and his wife executed a mortgage to McGregor of Mrs. Boardman's separate property to secure a note for six thousand five hundred dollars. Only the sum of two thousand dollars was ever advanced on account of this note and mortgage. Boardman and McGregor knew at the time

of the execution of the note and mortgage that Boardman was insolvent, and Boardman afterwards expended large sums of money in building upon and improving his wife's land, with the intention of defrauding his creditors. At the time his wife signed the note and mortgage, she did not know or believe that Boardman was insolvent, nor did she know his pecuniary condition. For the purpose of showing McGregor's fraudulent knowledge and intent, the plaintiffs offered in evidence the written answers which he made while being examined under oath by order of the judge of insolvency. It appeared that this examination took place on different days, and often in the absence of McGregor's counsel, with the understanding that he should have the right to submit his answers to his counsel before they should be signed and filed. They had been delivered to McGregor for this purpose, and had been in his possession for two months, and until produced in court.

Gaston and Churchill, for the plaintiffs.

Harmon, for the defendants.

By Court, GRAY, J. By the statutes of this commonwealth, the real estate of Mrs. Boardman remained, notwithstanding her marriage, her separate property, not subject to the interference and control of her husband, or liable for his debts; and might be conveyed away by her, either with his assent in writing, or without such assent with the approval of a judge of this court, or of the superior court or the probate court: Gen. Stats., c. 108, secs. 1, 3; *Hills v. Bearse*, 9 Allen, 403; *Staples v. Brown*, 13 Id. 64. These statutes are inconsistent with the hypothesis that the husband has any estate in his wife's land which he can convey separately during her lifetime, or which will pass to his assignees in insolvency. The provision of the tenth section of the same chapter, that nothing contained in the preceding sections shall destroy or impair the husband's rights as tenant by the curtesy, or enable the wife to do so by will or conveyance without his written assent, secures to him only the enjoyment of the estate himself, and gives him no greater right during their joint lives to alienate his interest by a separate conveyance than a wife under the earlier law had over her right of dower in her husband's lands. The mortgage executed by Boardman and his wife to McGregor cannot therefore be avoided by the plaintiffs as in fraud of his creditors.

As to the amount of money afterwards expended by the

husband upon the wife's land, the evidence introduced by the parties at the hearing is not specific enough to enable the court to determine whether the plaintiffs are entitled to any relief by reason of such expenditure; but affords the means of laying down general rules to guide further inquiry. McGregor is found to have actually advanced to the husband the sum of two thousand dollars upon the mortgage of the wife's land, and is entitled, as against the wife, to hold his mortgage as security for the repayment of that sum. The wife had no knowledge of her husband's pecuniary condition, and is not shown to have participated in any fraudulent act or intent.

Under these circumstances, if no greater sum of money was expended by the husband after the execution of the mortgage upon the land than two thousand dollars, the sum which had been raised and charged upon the land, or if more than two thousand dollars was so expended by the husband, but the excess above that sum did not increase the value of the land above what it would have been without it, his creditors or assignees in insolvency have no equity against the wife, who has participated in no fraud against such creditors, and whose estate has received no benefit from the transactions of the husband. But if more than two thousand dollars has been expended upon the land since the making of the mortgage, and the excess over two thousand dollars has increased the value of the estate, then the amount of such increase in value, for which no consideration has been paid by the wife, and which has been added to her estate by the husband in fraud of his creditors, in equity belongs to them, and may be made a charge upon the land for their benefit.

The answers made in writing under oath by McGregor were clearly admissible in evidence against him. The fact that they had not been revised by his counsel did not make them incompetent, whatever effect it may have upon their weight.

The case must therefore be referred to a master to inquire and report what amount of money was fraudulently expended by the husband on the land after the making of the mortgage, and if that amount exceeded two thousand dollars, how much the excess increased the value of the land. All further directions are reserved until the coming in of the master's report.

THE PRINCIPAL CASE IS CITED IN *Moore v. Lampton*, 80 Ind. 301, where it was held that a complaint by a creditor of the husband to charge his demand upon real estate of the wife, or the rents thereof, on the ground that the hus-

band had expended his own means in making improvements thereon in fraud of his creditors, must show that at the time the husband had not other property sufficient, and that, knowing of the husband's fraudulent intention, she participated or acquiesced in it. It is cited *arguendo*, and its principle said to apply, in *Lincoln v. Wilbur*, 125 Mass. 249, 253; *Walsh v. Young*, 110 Id. 396-399; and *Cone v. Hamilton*, 102 Id. 56. It is cited to the point that the written answers of a witness before a register in bankruptcy, though not written or signed by him, are admissible as his statements; and in *Goodrich v. Wilson*, 119 Id. 429-435, to much the same point.

KINGSBURY v. DEDHAM.

[13 ALLEN, 184.]

OBJECT IN HIGHWAY, SUCH AS SMALL PILE OF GRAVEL, WITH WHICH TRAVELER DOES NOT COME IN CONTACT or collision, and which is not shown to have been a natural encumbrance or obstruction in the way of travel, is not to be deemed a defect for the sole reason that it was of a nature to cause a horse to take fright, to escape from his driver, and do damage.

THE opinion contains a sufficient statement of the case.

W. Colburn, for the defendants.

R. R. Bishop, for the plaintiffs.

By Court, BIGELOW, C. J. It is quite impracticable to prescribe any general rule applicable to all cases which will limit and precisely define the extent of the liability of towns and cities for accidents arising from defects and causing damage to persons and property, which may happen on highways and bridges which they are bound to keep in repair. Each case must be decided mainly on the facts and circumstances which are shown to exist at the time of the particular occurrence which is the subject of investigation. But an approximation to a fixed rule or standard may be attained by determining with certainty the particular kinds or classes of objects or encumbrances within the limits of a way, and the condition of its surface arising from certain extraneous causes, which cannot properly be held to constitute defects or a want of repair for which a city or town can be held liable. This has already been partially done in several recent decisions of this court: *Hixon v. Lowell*, 13 Gray, 59; *Vinal v. Dorchester*, 7 Id. 421; *Keith v. Easton*, 2 Allen, 552; *Barber v. Roxbury*, 11 Id. 318; *Stanton v. Springfield*, 12 Id. 566; *Hutchins v. Boston*, 12 Id. 571 note. The case at bar, although differing in

some particulars from any previously adjudicated case, seems to us to come within a class or description which has passed under the judicial cognizance of this court. The precise point now presented for adjudication is, whether an object in a highway, with which a traveler does not come in contact or collision, and which is not shown to have been an actual encumbrance or obstruction in the way of travel, is to be deemed a defect for the sole reason that it was of a nature to cause a horse to take fright, in consequence of which he escaped from the control of his driver and caused damage to person and property. In *Keith v. Easton*, 2 Allen, 552, it was decided that an object situated outside of the traveled path, but within the limits of the highway, which caused a horse to take fright and run away, was not an actionable defect. The only distinction between that case and the present is, that in the former the cause of the fright was not placed in the part of the way wrought or used for travel, but in the latter it was situated in or near the center of the road. This difference, however, is not material. A town is required not only to keep the traveled part of the way safe and convenient, but also to see that the other portions of the road are in such condition that a traveler using due care may pass without danger of accident: *Bigelow v. Weston*, 3 Pick. 267; *Snow v. Adams*, 1 Cush. 443; *Kellogg v. Northampton*, 4 Gray, 69. If, therefore, a town is not responsible in damages for an injury caused by the fright of a horse arising from an object situated on the side of a highway, when, as in the case of *Keith v. Easton*, *supra*, there was no fault in the horse or driver contributing to the accident, *pari ratione* the defendants cannot be held liable in this action for damages done to the plaintiff under similar circumstances, where the fright of the horse was occasioned by an object or encumbrance within the limits of the traveled path. Among the many cases which have arisen and been adjudicated by this court concerning the liability of towns for damages caused by defects in highways, there is not one in which it has been held that an object in a highway, or the condition of the surface of a road, which is not otherwise a hindrance or obstacle to travelers except that it may by its appearance or shape be the cause of fright in a horse, and over and by which a traveler might have passed with safety but for the fear excited in the animal, can be regarded as a defect or want of repair for which a town is liable. In *Lund v. Tyngsborough*, 11 Cush. 563 [59 Am. Dec. 159], in which the

fright of the horse contributed to the accident, the alleged defect was not a condition of the way which occasioned that fright, but the existence of a hole in a culvert of so dangerous a character as to render it an act of prudence for the plaintiff to leap from her carriage in order to avoid the danger of its coming in contact with the hole while the horse was in a state of alarm arising from another cause.

Upon careful consideration, it seems to us that it would be giving an unwarrantable interpretation to the statutes which impose on towns the duty of keeping the highways within their respective limits in safe and convenient condition, and render them responsible for injuries arising from defects or want of reasonable repairs, to hold that the existence of an object within the limits of a way, or the state of the surface of the road, which may cause horses to take fright, constitutes a culpable neglect. It would be quite impracticable for a city or town, however diligent and careful it might be, to conform to such a standard of duty. A small piece of white paper lying on the surface of a way in a bright sunlight, a discoloration of a patch of the road by moisture or other cause, rendering it darker than other portions, a little tuft of hay or seaweed lying by the side of the traveled path,—these and other similar objects, which the highest diligence could not prevent or seasonably remove, would expose towns to liability to actions for damages. In the case at bar, there is nothing in the facts stated in the exceptions from which it can be fairly inferred that the road, at the place where the accident happened, was defective, except that it was in such condition as to cause the plaintiffs' horse to take fright. On the contrary, the alleged defect was a small pile of loose gravel not exceeding fifteen inches in height, over or through which the wheels of the carriage, if they had come in contact with it, would in all probability have passed in safety. Under the instructions given to the jury, it is to be presumed that the verdict for the plaintiffs was founded solely on the fact that the heap of gravel was of such a shape and character as to be likely to frighten horses. This construction was erroneous. A town is not liable for every object which renders a way unsafe or inconvenient for travelers to pass over it, but only for such as not only renders the way unsafe and inconvenient, but also defective or out of repair; and the injury must be attributable to the defect or want of repair: *Barber v. Roxbury*, 11 Allen,

318. On the facts proved at the trial, no such defect or want of repair was shown.

Exceptions sustained.

OBJECT UPON OR NEAR TRAVELED WAY, which in its nature is calculated to frighten horses of ordinary gentleness, may be held, under some circumstances, to constitute a defect in the way itself: Dillon on Municipal Corporations, sec. 1011, citing the principal case, and thoroughly discussing the question therein involved.

THE PRINCIPAL CASE IS CITED in *Cook v. City of Charlestown*, 98 Mass. 80, where it was held that if a traveler's horse became frightened at an object in the highway which is an obstruction and defect, and with which but for his fright he would have come in contact, but because of his fright runs away without coming in contact with it and does damage, the town is not liable. It is cited to the same effect in *Bemis v. Arlington*, 114 Id. 507; *Cook v. Montague*, 115 Id. 571; and in the Indiana case of *Brookville & C. T. Co. v. Pamphrey*, 59 Ind. 86. It is cited in *Street v. Holyoke*, 105 Mass. 82, to the general point that it is the duty of the city to keep its streets in repair.

FRANKLIN v. FISK.

[13 ALLEN, 211.]

SURFACE WATER. — Owner of land adjoining highway may erect upon his land a dam or obstruction to prevent water flowing through a culvert which the public had built for the purpose of draining off the surface water upon the road. Provided he does not exceed the limits of his own land, he may do anything to prevent the surface water upon the highway from being drained upon his premises.

BILL to restrain defendant from obstructing a culvert. Defendant owned land adjoining a highway over which large quantities of surface water flowed. To improve the road, a culvert was built across the highway through defendant's wall, and a slight trench about three feet into his land was dug to carry off the water. Defendant filled up the trench, and built a dam on his own land, which prevented a large quantity of the water from running thereon, and caused it to flow along the highway, greatly to its damage.

N. F. Safford, for the plaintiffs.

A. Churchill, for the defendant.

By Court, CHAPMAN, J. When highways are established, they are located by the public authorities with exactness, and the easement of the public, which consists of the right to make them safe and convenient for travelers, and to use them for public travel, does not extend beyond the limits of the loca-

tion. A surveyor of highways who fells a tree upon the adjoining land *extra viam* is a trespasser: *Elder v. Bemis*, 2 Met. 599. Neither his office nor the existence of the highway gives him any authority to meddle with the land outside the limits of the highway. The case of *Babcock v. Western R. R.*, 9 Id. 553 [43 Am. Dec. 411], which is cited for the plaintiffs, is not applicable to the present case. It relates to a right under a railroad charter, and a grant by the land-owner to the corporation.

As against an adjoining owner of the fee, the defendant would have had a right to raise the surface of his land, or build a structure upon it so high as to prevent any surface water from coming upon it from the adjoining land: *Gannon v. Hargadon*, 10 Allen, 106 [87 Am. Dec. 625]. The public have no greater right to restrain him in the use of his land than they would have had if they had been absolute owners of the land included in the highway. They may raise the level of their traveled path, and do not violate his rights if the effect of their act is to cause the surface water to flow upon his land. And he may also raise his land, or may erect upon it a building or other structure which shall prevent this effect without violating their rights: *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Id. 601; *Dickinson v. Worcester*, 7 Allen, 19.

The right of adjoining proprietors to erect structures upon their land up to the line of the highway is exercised everywhere; and the defendant has the same rights in this respect as if his land were in the midst of a village or city. If by legal acts done upon his own land he has prevented the water from passing off from the highway through the plaintiffs' culvert, their only remedy is to dispose of their surface water in some other way.

Bill dismissed, with costs.

SURFACE WATER: See law relating to this question discussed in *Halde- man v. Bruckhart*, 84 Am. Dec. 511. Owner of land cannot, by artificial channel, drain water standing upon his own land upon that of another: *Müller v. Laubach*, 86 Id. 521. Owner of land may erect obstruction to prevent influx of water from adjoining premises: *Beard v. Murphy*, 86 Id. 693. There is no such thing as a right to any particular flow of surface water *jure natura*. The owner of land may at his pleasure withhold the water flowing on his property from passing in its natural course onto that of his neighbor, and in the same manner may prevent the water falling on the land of the latter from coming on his own: *Bowlsby v. Speer*, 86 Id. 216. See a full discussion of this question in *Livingston v. McDonald*, 87 Id. 563, and *Gannon v. Hargadon*, 87 Id. 625. The principal case is cited in *Bates v. Smith*, 100 Mass. 181,

to the point that the proprietor of land may erect structures upon it as solid and as high as he pleases without regard to their effect upon surface water which would otherwise come from the adjoining lands upon his soil. It is cited to the same effect in *Macomber v. Godfrey*, 108 Mass. 219-221. It is cited in *Tanner v. Dartmouth*, 13 Allen, 291, where the converse of its doctrine was applied; namely, that an adjoining land-owner cannot maintain an action against town officers for so improving a highway as to cause large quantities of surface water to flow upon his land.

BOARDMAN v. SPOONER.

[13 ALLEN, 353.]

STATUTE OF FRAUDS. — DELIVERY AND ACCEPTANCE. — Where a person in Massachusetts sells some hides in a New York warehouse, and gives a bill of the goods and an order on the warehouseman to the buyer, without notifying the warehouseman, this is not such a delivery to and acceptance by the buyer as satisfies the statute of frauds.

MEMORANDUM IN WRITING SIGNED BY PARTY TO BE CHARGED IS NOT ESTABLISHED by showing that the seller gave to the buyer a bill of items of the property, together with an order for the delivery of the goods where they were stored, and that the buyer stamped with a machine his name and the date thereon, without evidence showing when or for what purpose it was done.

STATUTE OF FRAUDS — ENTRY IN BOOK TO TAKE CASE OUT OF. — Where goods are sold, the sale to be subject to the buyer's approval of the goods, an entry in the broker's books reciting the sale, but omitting to state that the sale was to be subject to the buyer's approval, is defective, and does not take the case out of the statute.

USAGE OF TRADE CANNOT BE ESTABLISHED which ingrafts on a contract of sale a stipulation or obligation different from or inconsistent with the rule of the common law on the subject; so a usage repugnant to the terms of a contract is inadmissible to control it.

ACTION to recover the price of certain hides which plaintiff claims to have sold to defendants. Defendants denied the sale, and set up the statute of frauds. At the trial, it appeared that Morey, a broker and dealer in hides, bargained with plaintiff for the purchase of those in question; that he took a memorandum of their weight, and requested plaintiff to charge them to defendants, as he had at that time no instructions to make purchases for them. Morey immediately sent his brother to one of the defendants, Mr. Butler, with a memorandum of the weights, who informed him that he could have the hides at the price named. Upon being asked by Butler who should judge of the quality, he replied, "Mr. Butler." Upon his brother's return, in Morey's book and at his request, the brother

made the following entry: "Boston, September 9, 1865. Sold Wm. B. Spooner & Co., acc. B. G. Boardman, five bales D. G. cowhides, one bale dry do. @ seventeen cents per pound net cash, delivered in N. Y." On the same day, plaintiff sent a bill of the hides, and an order on the warehouseman in New York, where the hides were stored, for their delivery to the broker, who sent them to Butler. Two weeks later the warehouse and hides in New York were destroyed by fire. The hides in question were the only ones which plaintiff had in the warehouse, and they were of good quality, and the weights given were correct. At the trial, no evidence was given that the warehouseman had been notified of the sale, or that defendants had made any demand upon him for the hides. When the memorandum of weights and the order were produced at the trial by defendants upon notice from plaintiff, they were found to be stamped with the name of defendants by a machine, but when or for what purpose did not appear. At the trial, Morey testified that in the ordinary way in which he sold hides in New York, it was expected that the purchaser or his agent would go and see if the quality was satisfactory; that he believed it to be a well-settled custom in his trade that the purchaser was allowed three days to examine the goods, and three days in which to make payment, unless agreed to the contrary; and that the rule was, that goods were sold subject to approval of purchaser or public inspector, and that there was no public inspector of that kind of hides. Verdict for defendants, and plaintiff alleged exceptions.

J. D. Ball, for the plaintiff.

F. E. Parker, for the defendants.

By Court, FOSTER, J. The first ground upon which the plaintiff relies to satisfy the requirements of the statute of frauds, General Statutes, c. 105, sec. 5, is that the purchaser has accepted and received part of the goods sold. The only act proved tending to support this proposition is the following: On the day of the contract a bill of the hides, which were in a general warehouse in New York and deliverable there, was made out to the defendants, together with an order to deliver them to the bearer, and the plaintiff sent these papers to the broker, who on the same day handed them to one of the defendants. The defendants are not shown to have done anything except to take and keep the bill and order. Nor does it

appear that any notice of the transaction was given to the warehouseman.

The statute is silent as to the delivery of goods sold, which is the act of the seller. It requires the acceptance and receipt of some part thereof, which are subsequent acts of the buyer. We are aware of no authority for holding this provision to be complied with where nothing more appears to have taken place than in the present instance. When goods are in the custody of a third person, an order for their delivery, with notice to that person (but never without such notice in this state), has been decided to be sufficient to pass the property as against attaching creditors of the vendor: *Tuxworth v. Moore*, 9 Pick. 347 [20 Am. Dec. 479]; *Carter v. Willard*, 19 Id. 1; *Burge v. Cone*, 6 Allen, 412. But some well-considered English cases hold that to constitute acceptance and receipt under the statute of frauds there must also be an assent by the party in whose custody the goods are to hold them for the vendee: *Bentall v. Burn*, 3 Barn. & C. 423; *Farina v. Home*, 16 Mees. & W. 119. In the present case there was no evidence from which a jury would be authorized to infer an acceptance and receipt by the purchaser.

Next, the plaintiff insists that there was a note or memorandum in writing of the bargain, made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized. The vendor's bill of sale, or of parcels, unsigned by the vendee, who is the party to be charged, does not, of course, bind the latter: *Hawkins v. Chace*, 19 Pick. 502. The stamping of the purchasers' name and a date on the bill and memorandum of weights at some time while these papers were in their possession, without evidence when or for what purpose this was done, did not show that they had adopted such a stamp as a signature, and affixed it to the instruments with the intent to bind themselves thereby. This may have been done for their own convenience, to show the date of the reception of the papers. If designed as the signature of a memorandum obligatory on the vendees, we should expect to find the papers in the custody of the party for whose benefit, and not of the one by whom, they were signed. We do not regard the mere fact that when these papers were produced at the trial by the defendants they were found to be so stamped as a circumstance which either a court or jury would be at liberty to treat as proof of a signature by the party to be charged.

We have therefore to consider the sufficiency of the entry of the transaction upon the broker's book. This is not aided by the contents of the memorandum of weights, because the two instruments contain no reference to each other, and the connection between them cannot be proved by oral evidence, if there were any such in the case: *Morton v. Dean*, 13 Met. 385.

In the conversation between the broker's clerk and Mr. Butler, one of the defendants relied upon to prove the verbal bargain, the latter asked who should be the judge of the quality; the clerk replied, "Mr. Butler." Butler then said if that was so he would take the hides. This stipulation is wholly omitted from the entry on the broker's book, which contains no statement as to the quality of the hides. By the true construction of the writing, the contract of the defendants was absolute to purchase the hides if they answered the description, and were "five bales dead green and one bale dry." This was an engagement essentially different from the one actually made, according to which Butler or the firm were to judge of the quality; which would be a conditional bargain to take the hides if, upon examination by the vendees or one of them, the quality proved satisfactory, or so good that it ought reasonably to be satisfactory to the purchasers. The latter interpretation, if adopted, would not destroy the value of the purchasers' right of examination, and to judge in the first instance of the quality. The omission of the condition that the purchase was subject to the approval of the vendees as to the quality constitutes a material variance between the contract as made and as written down in the broker's book.

The plaintiff has endeavored to obviate this difficulty by proving a usage, the evidence of which came from only one witness, and was as follows: "In the ordinary way in which we sell hides situated in New York, it is expected that the purchaser will either go himself or have some agent there to see if the quality is satisfactory. . . . Goods are always sold subject to approval of purchaser or of public inspector. There is no public inspector of this kind of hides."

It has been considered to be a rule of law that the testimony of a single witness is insufficient to establish a usage of trade: *Parrott v. Thacher*, 9 Pick. 426; 1 Greenl. Ev., sec. 260 a. And it is well settled that a usage repugnant to the terms of a contract is inadmissible to control it. Nor can a usage of trade be maintained which ingrafts on a contract of sale a stipulation or obligation different from or inconsistent with the rule

of the common law on the subject. Thus a usage that in sales by sample there is an implied warranty against latent defects existing in both the sample and the bulk is illegal: *Dickinson v. Gay*, 7 Allen, 34 [83 Am. Dec. 656]. So likewise is a usage that in sales of a particular kind of merchandise there is an implied warranty of its merchantable quality; and that a broker without express authority may insert such a stipulation in his memorandum of the bargain: *Dodd v. Farlow*, 11 Id. 426.

If the purchasers had themselves signed a contract to buy five bales of dead green and one bale of dry hides, they could not be permitted to show that they were bound to receive them only in case upon examination by themselves they were in their judgment of good quality, either by proving an express oral stipulation or a usage of trade to that effect. Indeed, it is difficult to see how any stipulation can be ingrafted on a written instrument by proof of usage which could not be shown as an actual contemporaneous verbal agreement of the parties. In either case, the insuperable difficulty is that the oral evidence is repugnant to the written instrument. And that objection we consider applicable to the usage of which evidence was offered at the trial of the present case.

Furthermore, the supposed usage is contrary to the rule of law that in a contract of sale there is no implied warranty or stipulation as to the quality of the goods. A usage that the goods shall be of such a quality as to be approved by the buyer or a public inspector is assuredly an implied warranty or stipulation as to quality. *Dodd v. Farlow*, *supra*, is undistinguishable in principle, although the facts in that case are the converse of those in this. There, the broker without authority inserted a stipulation that the articles should be of merchantable quality, and in good order; here, an agreement as to quality actually made was omitted in the broker's entry of the bargain. In the case already adjudged, the effort was to justify the insertion of a stipulation not made by proof of usage; in that under consideration the agreement as to quality having been actually made in the oral bargain, proof of usage, according to which it would be implied, is invoked to supply its omission from the memorandum. Each defect is alike fatal, and incapable of being cured by any custom of trade.

Syers v. Jonas, 2 Ex. 111, decided in 1848, is much relied upon by the plaintiff as an authority in conflict with this view.

That was an action for the price of tobacco. The plea was *non assumpsit*. The plaintiff proved a bargain through a broker who had made the bought and sold notes. The defendant offered to show that the bulk was inferior to the sample, and that by the universal usage of the tobacco trade all sales were understood to be by sample, though not mentioned to be so in the contract. The question was, whether this was a customary incident of the bargain, which could be proved by oral evidence. It was held not to be expressly or impliedly excluded by the tenor of the written instrument; the usage was treated as annexing an additional term to the contract, not inconsistent with it, although amounting to an implied warranty or agreement that the bulk should correspond with the sample. In the opinion of the court, *Street v. Blay*, 2 Barn. & Adol. 456, was cited as to the nature of a warranty, and the same eminent judge by whom it was delivered, Baron Parke, at the argument, spoke of the words by sample "as a mere collateral engagement on the part of the seller that the commodity shall be of a particular quality"; and added: "If they merely amount to a warranty, and not a condition of sale, there would be nothing inconsistent with the contract in admitting evidence of the usage." We have great difficulty in comprehending how anything can be considered as a memorandum of a bargain which omits a warranty of the quality of the article sold. The omission of such a warranty was held a fatal defect under the statute of frauds in *Peltier v. Collins*, 3 Wend. 459 [20 Am. Dec. 711].

That a contemporaneous agreement of warranty cannot be ingrafted by oral evidence on a written instrument is well settled in this state: *Warren v. Wheeler*, 8 Met. 97; *Dutton v. Gerrish*, 9 Cush. 89 [55 Am. Dec. 45]; *Raymond v. Raymond*, 10 Id. 134; *Howe v. Walker*, 4 Gray, 318. Moreover, in Massachusetts the doctrine of *Street v. Blay*, *supra*, has never been adopted. We hold, in accordance with the earlier English cases, that where goods are sold with warranty, for a breach thereof the purchaser may return the goods and rescind the sale; such a warranty being treated as a condition subsequent, at the election of the vendee: *Bryant v. Isburgh*, 13 Gray, 607 [74 Am. Dec. 655]. Now, it is conceded in *Syers v. Jonas*, *supra*, and held, we believe, universally, that all conditions or essential terms of the bargain must appear in the memorandum: *Davis v. Shields*, 26 Wend. 341. The recent case of *McClellan v. Nicolle*, 4 L. T., N. S., 863, decided in 1861,

held a written acknowledgment of an oral bargain to be defective which omitted the stipulation that the looking-glass purchased was to be of the best quality. Certainly, the agreement in the present case that Mr. Butler should be the judge of the quality of the hides is a condition of the bargain, rather than a collateral undertaking, as much as the term omitted in *McClean v. Nicolle*, *supra*. Upon principle and authority, we remain fully satisfied with *Dodd v. Farlow*, *supra*, which must be regarded as the settled law of this commonwealth.

Another conclusive answer may be stated to the position that the broker's memorandum aided by the proof of usage is identical with the oral contract, and therefore satisfies the statute of frauds. The supposed usage as proved is not equivalent to the verbal stipulation. A usage that goods are always sold subject to the approval of a purchaser or of a public inspector, coupled with proof that there is no public inspector of a particular kind of merchandise, seems to us to show that the usage does not apply to such cases. The meaning of such a usage is, that if the purchaser does not approve the quality of the goods, there may be an appeal to the judgment of the inspector, who is to decide between the parties the question of quality. If there is no inspector, it cannot be optional with the purchaser to keep his contract or not. A usage that if there is no public inspector buyers may break their bargains at pleasure is too unreasonable to be maintained, if not too absurd to be suggested.

Upon full consideration, we conclude that the entry in the broker's book is insufficient, because it fails to correspond with and omits an essential portion of the actual bargain of the parties. We need not therefore examine the question whether an entry by a broker's clerk, sufficient in substance, would comply with the statute of frauds. The ruling of the court below that the defendants were entitled to a verdict is sustained, and the exceptions are overruled.

DELIVERY OF QUANTITY OF BARRELS OF FLOUR IN WAREHOUSE IS PERFECTED by giving the purchaser an order on the warehouseman, and the presentment of the order to him by the purchaser, with directions to enter it up to the account of the latter: *Horr v. Barker*, 70 Am. Dec. 791, and note.

MEMORANDUM NECESSARY TO TAKE CASE OUT OF STATUTE: See *McConnell v. Brillhart*, 65 Am. Dec. 661; *Old Colony R. R. Co. v. Evans*, 66 Id. 394; *Ives v. Hazard*, 67 Id. 500, and note.

USAGES OF TRADE, VALIDITY OF. — For a full discussion of the law relating to this question, see *Dickinson v. Gay*, 83 Am. Dec. 656, and note.

The principal case is cited to the point that a usage cannot be allowed to control the express intention of the parties to an agreement; nor the interpretation and effect which result from an established rule of law applicable to it; nor to ingraft on a contract of sale a stipulation or obligation different from or inconsistent with the rule of the common law on the same subject, in *Haskins v. Warren*, 115 Mass. 514, 536. The *dictum* of the principal case, that the testimony of one witness is insufficient to establish a custom or usage, is denied in *Jones v. Hoey*, 128 Id. 585.

THE PRINCIPAL CASE IS CITED to the point that a delivery of goods to a common carrier designated by the buyer, where the goods are never received by the buyer, is not a delivery to him under the statute, in *Johnson v. Cuttle*, 105 Mass. 447. It is cited in *Frost v. Blanchard*, 97 Id. 155, to the point that a previous or contemporaneous warranty cannot be ingrafted by parol upon a written contract; and in *Atwater v. Olney*, 107 Id. 369-375, to the point that a bill of items is not such a contract as the one to which the above rule applies.

TAYLOR v. BLANCHARD.

[13 ALLEN, 570.]

CONTRACT IN RESTRAINT OF TRADE. — A contract made between citizens of this state, upon good consideration, by which one of them agrees not to set up, exercise, or carry on the trade or business of manufacturing shoe-cutters within the commonwealth of Massachusetts, is void, although it appears that such manufacture is an art which can be carried on only by persons instructed in the same; that at the time they made the agreement plaintiff and defendant were about to enter into a partnership for the manufacture of shoe-cutters; that the agreement was to take effect at the expiration of the partnership; that at the time the agreement was made defendant knew nothing of the business, and only plaintiff and three other person in the state did.

ACTION upon an agreement by which plaintiff and defendant agreed to enter into the business of manufacturing and selling shoe-cutters for the term of one year from March, 1862, or such further time as they should agree upon. In the course of the agreement, Blanchard agreed with Taylor that at whatever time the partnership should end he would not at any time, either alone, or with any one else, or as agent, set up, exercise, or carry on the business of manufacturing or selling shoe-cutters at any place within the state of Massachusetts. He further agreed not to encourage opposition to Taylor, nor to divulge the secrets of his trade. At the trial it appeared that the manufacture of the cutters was an art which only persons instructed therein can carry on; that for several years before the making of the agreement plaintiff had been carrying on the business to a great extent and with large profit, and that at that time plaintiff was wholly ignorant of

the business. During the continuance of the partnership defendant became well acquainted with the business and its customers. After the dissolution of the partnership defendant set up business for himself, in violation of his agreement, and supplied the former customers of plaintiff. Verdict for defendant, to which plaintiff alleges exceptions.

Sweetser and Goodrich, for the plaintiff.

Train and Bent, for the defendant.

By Court, CHAPMAN, J. The question presented in this case is, whether a contract made between citizens of this state, upon good consideration, by which one of them agrees "not to set up, exercise, or carry on the trade or business of manufacturing shoe-cutters within the commonwealth of Massachusetts," is valid, or is to be regarded as void on the ground that it is contrary to the policy of the law.

The law has always regarded monopolies as hostile to the rights and interests of the public. One method of obtaining them in early times was by a grant from the sovereign to a particular individual of the sole right to exercise a particular trade. The mischief arising from these monopolies became so intolerable that the practice was suppressed by a clause in Magna Charta. This clause does not, however, apply to grants for the sole use of a new invention for a limited period. These grants, it is said, are indulged for the encouragement of ingenuity. Patent-right and copyright laws rest on this ground.

Another method by which monopolies were sought to be obtained was by private contracts, in which one of the parties agreed not to engage in some specified trade or business. In *Mitchel v. Reynolds*, 1 P. Wms. 181, which is usually cited as the leading case on this subject, corporations are specially mentioned as perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible. It was held in that case that a contract not to use a particular trade within the kingdom was void, on the ground that "it can never be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some places, unless he intends a monopoly, which is a crime." In subsequent cases, the subject has been much discussed in the English courts. It is said that all restraints are presumed to be bad; but if the circumstances are set forth, that presumption may be excluded, and the court are

to judge of these circumstances, whether the contract be valid or not. The law, it is said, protects trade for the sake of the public, and not for the sake of the parties engaged in it. It is regarded as beneficial to the public that contracts for the partial restraint of trade should be upheld to a reasonable extent. A territory including the whole city of London and several miles beyond has been considered as reasonable; but it is not necessary that the restraint should extend to the whole kingdom to be void. Contracts for the exclusive use of a secret art are not within the principle, for the public has no right to the secret. Nor does it extend to a sale of the exclusive use of a trade protected by a patent. Some of the recent cases in which this subject has been discussed, and the earlier cases cited, are *Mallan v. May*, 11 Mees. & W. 653; *Price v. Green*, 16 Id. 346; and *Nicholls v. Stretton*, 10 Q. B. 346.

This court has adopted the English doctrine so far as it has had occasion to consider them. In *Alger v. Thacher*, 19 Pick. 51 [31 Am. Dec. 119], it was held that a bond conditioned that the obligor shall never carry on or be engaged in the business of founding iron is void. But the restriction in that case was not limited to the commonwealth. In that respect it differs from the present case. On the other hand, it has been held that an agreement not to carry on a trade within a particular town or city is valid, and that such a restriction may extend to the whole of a particular stage route extending from Boston to Providence, or the navigation of the whole length of Connecticut River: *Pierce v. Fuller*, 8 Mass. 223 [5 Am. Dec. 102]; *Palmer v. Stebbins*, 3 Pick. 188 [15 Am. Dec. 204]; *Pierce v. Woodward*, 6 Id. 206; *Gilman v. Dwight*, 13 Gray, 356 [74 Am. Dec. 634]. It is also held that one may lawfully sell the right to carry on a secret trade, and bind himself not to carry it on nor to divulge the secret: *Vickery v. Welch*, 19 Pick. 523. So of the use of a machine protected by a patent: *Stearns v. Barrett*, 1 Id. 443. So of a business which is carried on out of the country: *Perkins v. Lyman*, 9 Mass. 522. In several of the states, contracts for the partial and limited restraint of trade have been upheld. In New York, it is held by the court of appeals that a restraint extending throughout the state is void: *Dunlop v. Gregory*, 10 N. Y. 241 [61 Am. Dec. 746]. And the supreme court has held that a restraint extending through all the territory west of Albany is void: *Lawrence v. Kidder*, 10 Barb. 641.

The plaintiff contends that the trade in the present case was

secret. But we cannot so regard it; for although it was not generally known to the public, it was carried on in three different towns in the commonwealth by three different parties, who had no connection in business with the parties to this contract.

The plaintiff further contends that in this country a restraint ought not to be held void unless it extends throughout the United States, because they are one country in respect to trade and business, and the power to grant patents and copyrights and to regulate trade is vested in the United States government. But we cannot regard this view as just. A monopoly extending throughout the state may be as really injurious to the people of the state as if it extended throughout the whole country. Whether the principle extends to a case where by means of traveling agents one has extended his business through a large part of the country, or a large part of the state, and sells the good-will of his business with a restriction merely co-extensive with that good-will, and not extending beyond the actual sphere of the business of the vendor, we need not discuss. The law regards the good-will of a particular trade as property having a market value, and protects it to a reasonable extent, depending somewhat upon the nature and character of the business.

The plaintiff also contends that the restriction in this case is reasonable because the territory of Massachusetts is comparatively small, and the business is the manufacture of an article which is used only by manufacturers of shoes. But we do not think the extent of territory embraced in a state affects the principle. Whatever may be the extent of the state, the monopoly restricts the citizen from pursuing his business, unless he transfers his residence and his allegiance to some other state or country. Its tendency is to drive business and citizens who are skilled in business from this to other states. If one is not at liberty to carry on his business here, but is at liberty to do so elsewhere, he will be likely to go elsewhere, and employ others to go with him.

The disposition to obtain monopolies which formerly prevailed is by no means extinct at the present day, nor is it confined to corporations. Combinations of men in business sometimes accomplish such an object, and they often succeed in obtaining exorbitant profits from the public.

In the present contract the court can see nothing beneficial

to the public, and are of opinion that it is contrary to the well-established policy of the law, and void.

Exceptions overruled.

CONTRACTS IN RESTRAINT OF TRADE. — Contract not to carry on business or trade, made upon good consideration, may be sustained, where there are special circumstances rendering the restriction reasonable and useful, and the promisor is not restrained more than is needful for the protection of the promisee in the enjoyment of the promisor's good-will: *Dunlop v. Gregory*, 61 Am. Dec. 746. Contract in restraint of trade within limits that may be adjudged reasonable by the court, and not injurious to the public, is valid: *Beard v. Dennis*, 63 Id. 380. Contract in restraint of trade is not void where there is a consideration for it, and good reason for entering into it, and where it imposes no restraint not beneficial to the other party to the contract: *California Steam Navigation Co. v. Wright*, 65 Id. 511. Whether limits prescribed in contract in restraint of trade are reasonable or not depends upon the kind of business about which the contract is made. That the public interest will not suffer within those limits may appear from evidence of the number of places where such business is transacted therein: *Duffy v. Shockry*, 71 Id. 348.

THE PRINCIPAL CASE IS CITED to the point that a secret art is a legal subject of property; and that a bond for a conveyance of the exclusive right to it is not open to the objection of being in restraint of trade, but may be enforced by action at law, and requires the obligor not to divulge the secret to any other person, in *Peabody v. Norfolk*, 98 Mass. 452, 460. In *Morse Twist Drill etc. Co. v. Morse*, 103 Id. 73, the principal case is distinguished, and a contract for the sale of a patent with covenants not in any manner to compete with the purchaser thereof was held good. It is also distinguished in *Boutelle v. Smith*, 116 Id. 111-114, where a contract by which a baker sold his business in a certain town and agreed not to exercise his trade within the limits thereof for five years, nor in any wise to compete with his purchaser, was held valid and binding upon him.

YEACKEL v. LITCHFIELD.

[18 ALLEN, 417.]

PURCHASE BY ADMINISTRATOR AT HIS AUCTION SALE OF REALTY OF DECEASED will not be held void at law where no repayment has been made or tendered of the purchase-money, and no express or actual fraud is shown. But by a proper proceeding in equity, such sales will always be set aside.

WRIT of entry. The opinion states the point.

G. Sullivan and A. Wellington, for the demandants.

A. Churchill and H. W. Paine, for the tenant.

By Court, FOSTER, J. This is a writ of entry by a part of the devisees under a will to recover their undivided shares of

certain real estate which the tenant purchased at a sale by the administrator with the will annexed, under a license for the payment of debts.

No objection is made to the regularity of the proceedings or the validity of the title acquired by the tenant, except in the following particular: he purchased under a verbal agreement with and for the benefit of the administrator. The amount which he bid was the full value of the estate, but he has paid only a part of the purchase-money, and has successfully resisted an action by the administrator for the residue, on the ground of the arrangement or bargain between them. The case must be treated precisely as if the title were in the administrator, and this action had been brought against him to recover an estate which he had purchased through the intervention of an agent at a sale made by himself in his fiduciary capacity.

The question is, whether in a writ of entry such a sale can be adjudged void where no express fraud is shown, and no repayment has been made or tendered of the purchase-money.

The doctrine in equity is perfectly well settled both in England and America that executors and administrators, like trustees, who become buyers at sales made by themselves, acquire only an imperfect title, which will always be set aside at the option of any of the parties interested in the property on their application within a reasonable time. However free from fraud any particular transaction may be, and however ample may be the price paid, from this rule a court of equity never departs. But such a sale is not absolutely void; it cannot be set aside by a stranger, and it will be confirmed by acquiescence or unreasonable delay to avoid it. The purchase-money must be refunded, and even expenditures for repairs and permanent improvements. In short, complete equity must be done between the parties. Where the party applying to set aside such a sale does not desire or is not entitled to have a reconveyance, the relief frequently granted is to order the estate put up again at a minimum price of the sum for which it sold at the first sale. If no one will give more, the first sale is confirmed, and the first purchaser held to his bargain; but if an advance is bid, he cannot have the estate. See notes to *Fox v. Mackreth*, 1 White and Tudor's Lead. Cas. in Eq. 92; *Davous v. Fanning*, 2 Johns. Ch. 252; *York Buildings Co. v. Mackenzie*, 8 Brown Parl. C. 42; *Robbins v. Bates*, 4 Cush. 104.

This brief view of the principles and procedure of courts of

equity in cases like the present shows how impossible it would be to administer any such adequate and complete remedial justice in an action at common law. But it is argued that under our Massachusetts system such purchases have been held void at law. The cases of *Somes v. Skinner*, 16 Mass. 348, and *Somes v. Brewer*, 2 Pick. 191, related to an express fraud of a very gross character. *Litchfield v. Cudworth*, 15 Id. 31, contains a statement of the doctrine in equity, and the remarks of the judge who delivered the opinion seem favorable to applying it at law; but in that case the conveyance was avoided upon another and "more fatal objection to the proceedings of the administrator."

On the other hand, in *Harrington v. Brown*, 5 Pick. 521, it is said the first objection is "that the conveyance from the administrator to himself is void. No authority to that effect has been cited. It could not be avoided at common law, unless accompanied by fraud. The mere fact of the administrator's being the purchaser does not prove fraud, for he may have purchased for the benefit of all concerned in the estate."

In one or two other instances the subject has been referred to in our reports, but we are aware of no case adjudging that a purchase by an executor, administrator, trustee, or other person holding a similar fiduciary capacity of the estate which he himself sells can be avoided at law except for actual fraud. Before full equity jurisdiction existed, there were strong motives for granting at law the relief ordinarily obtainable in equity elsewhere to prevent failure of justice from the imperfection of our jurisprudence. Now that we possess a system of equity, simple, convenient, expeditious, and extending to all cases where there is not a plain, adequate, and complete remedy at law, there remains no reason for attempting to enlarge the rules of the common law, and to administer imperfectly on that side of the court relief so much more completely and satisfactorily obtainable in equity.

The failure of the demandants in this action does not preclude them from filing a bill in equity.

Exceptions overruled.

PURCHASE BY ADMINISTRATOR AT HIS OWN SALE. — Each of the heirs or their assignees has an individual right to avoid a sale made by an administrator, at which he was a purchaser: *Remick v. Butterfield*, 64 Am. Dec. 316. Purchase by an administrator at a sheriff's sale of his intestate's realty may be set aside by the heirs without showing that he was guilty of actual fraud or that he had made an advantageous purchase: *Martin v. Wyncoop*, 74 Id.

209. To the same effect is *Boyd v. Blankman*, 87 Am. Dec. 146. See the notes to these cases.

But sales and purchases such as above are not void, but voidable at the election of the heirs or other persons interested in the estate, who may have the sale set aside and the administrator declared a trustee: *Boyd v. Blankman*, 87 Am. Dec. 146. But heirs cannot repudiate a sale made by an administrator to himself unless they elect to do so within a reasonable time; and a delay of four years by persons *sui juris* is an unreasonable one: *Flanders v. Flanders*, 68 Id. 523.

THE PRINCIPAL CASE IS CITED to the point that where one who in exercising an authority to sell becomes himself the purchaser, either directly or indirectly, he may always be treated by the parties in interest as having purchased for their benefit if they elect so to do within a reasonable time after knowledge of the facts, in *Clark v. Blackington*, 110 Mass. 369, 376, and *Newhall v. Jones*, 117 Mass. 252, 259.

GILMAN v. EASTERN RAILROAD COMPANY.

[13 ALLEN, 433.]

FELLOW-SERVANT, INJURY THROUGH ACT OF, WHO LIABLE. — Servant, on entering master's service, assumes all the risks of that service which the master, exercising due care, cannot control, including negligence of fellow-servants. But master is bound to exercise ordinary care in providing suitable machinery and proper servants to carry on his business, and is liable to other servants for his neglect so to do.

FELLOW-SERVANTS. — If master knows, or by the exercise of due care might have known, that servants employed by him are incompetent, either at the time of employing them or at any subsequent time while they are in his employ, he is liable for their incompetence causing damage to their fellow-servants.

FELLOW-SERVANTS, LIABILITY OF EMPLOYER FOR ACTS OF. — Where a flagman employed by a railroad company is an habitual drunkard, and is usually employed to manage a switch, and where the fact of his drunkenness is known to the officers of the company, or by due care might have been known to them, and he, while intoxicated, misplaces a switch whereby another employed by the railroad company is injured, the company is liable, although it was the duty of another person to manage the switch, and although a proper local agent is employed to superintend the employees of the company, and due care was exercised in the selection of the flagman when he was first employed.

EVIDENCE. — WHERE PLAINTIFF WAS INJURED THROUGH ALLEGED INTemperance OF SWITCHMAN IN DEFENDANTS' EMPLOY, and it is claimed that he is habitually intemperate, evidence that that is his general reputation is admissible to show that the defendants, if they used due care, might have known that he was habitually intemperate, and therefore an unsuitable servant to be employed by them.

ACTION to recover damages for personal injuries. The evidence at the trial was very contradictory. It appeared that at the time the accident happened, plaintiff and some of his fel-

low-workmen were going home on a flat-car pushed ahead of a locomotive; that a short time before they arrived at a certain switch, the car was uncoupled from the engine, which slackened its speed to permit the car to go ahead of it to a switch, which was to be adjusted so as to run the car off on a side-track, and then put back for the engine to pass along the main track to the engine-house. Plaintiff offered evidence tending to show that for some months previous to this time a man named Shute had been employed at this crossing as a flag and switch man, and that for some time past he had had charge of this switch; that Shute was an habitual and constant drunkard, and was publicly so while on duty; and that defendants' superintendent who had charge of their business was at this crossing frequently, and might have known of Shute's habits,—at the time the accident occurred, Shute was in charge of the switch; that he was much intoxicated, and by reason thereof could not properly manage the switch, and that in consequence of its misplacement plaintiff was injured. Plaintiff also offered evidence that Shute had the reputation of being an intemperate man. The court admitted this evidence, not for the purpose of showing that Shute was intemperate, but for the purpose of showing, in case his intemperance was shown by other evidence, that his habits were well known in the community. Defendants offered evidence that Shute was employed as a flagman, and not as a switchman; that their officers had no knowledge that he ever took charge of the switch; that the same was no part of his duty, but according to the rules of the company, it was the duty of the conductor; and that they had no knowledge that he was intemperate. They also offered evidence to the effect that the accident occurred in a manner different from that claimed by plaintiff. Verdict for plaintiff, to which defendants allege exceptions.

J. G. Abbott and C. M. Ellis, for the defendants.

T. H. Sweetser and J. D. Howe, for the plaintiff.

By Court, GRAY, J. The rules of law are now well settled, and were affirmed in the opinion already given in this case, and reported in 10 Allen, 236, that a servant, by entering into his master's service, assumes all the risks of that service which the master, exercising due care, cannot control, including those arising from the negligence of his fellow-servants; but that the master is bound to use ordinary care in providing

suitable structures and engines and proper servants to carry on his business, and is liable to any of their fellow-servants for his negligence in this respect. This care he can and must exercise, both in procuring and in keeping or maintaining such servants, structures, and engines. If he knows, or in the exercise of due care might have known, that his servants are incompetent, or his structures or engines insufficient, either at the time of procuring them, or at any subsequent time, he fails in his duty. For the management of his machinery and the conduct of his servants he is not responsible to their fellow-servants; but he cannot avail himself of this exemption from responsibility when his own negligence in not having suitable instruments, whether persons or things, to do his work causes injury to those in his employ. He cannot divest himself of his duty to have suitable instruments of any kind by delegating to an agent their employment or selection, their superintendence or repair. A corporation must, and a master who has an extensive business often does, perform this duty through officers or superintendents; but the duty is his, and not merely theirs, and for negligence of his duty in this respect he is responsible. To hold otherwise would be to exempt a master who selected all his machinery and servants through agents or superintendents from all liability whatever to their fellow-servants, although he had been grossly negligent in the selection or keeping of proper persons and means for conducting his business. In the case of a corporation, the president and directors, at least, cannot be deemed mere servants, but must be considered as representing the corporation itself.

The rule, as applied to this case as now presented, may be briefly stated thus: A railroad corporation is bound to provide proper road, machinery, and equipment, and proper servants. It must do this through appropriate officers. If, acting through appropriate officers, it knowingly or negligently employs incompetent servants, it is liable for an injury occasioned to a fellow-servant by their incompetency. If it continues in its employment an incompetent servant after his incompetency is known to its officers, or so manifest that its officers, using due care, would have known it, such continuance in employment is as much a breach of duty and a ground of liability as the original employment of an incompetent servant.

It is true that it is no ground for charging a master for an

injury to his servant that it resulted from the negligent act of a superintendent or other servant of a higher grade than the plaintiff, and whose orders the plaintiff was bound to obey: *Albro v. Agawam Canal*, 6 Cush. 75; *Feltham v. England*, L. R. 2 Q. B. 33. But in each of these cases, as well as in *King v. Boston and Worcester R. R.*, 9 Cush. 112, one of the reasons on which the master was held not to be liable was the want of evidence of any neglect on the master's part in providing or maintaining suitable agents or structures. If the incapacity of an agent or the insufficiency of a structure is known to the master, or has existed so long or under such circumstances that, exercising due care, he ought to have known it, he is responsible. Upon this ground it was held, in *Snow v. Housatonic R. R. Co.*, 8 Allen, 441 [85 Am. Dec. 720], that a railroad corporation might be liable to one of its servants for an injury caused by a want of repair which had existed for two months in its road-bed, although it was the immediate duty of another servant of the corporation to see that the road-bed was kept in proper repair. Similar decisions have been made in many other states: *Noyes v. Smith*, 28 Vt. 59 [65 Am. Dec. 222]; *Keegan v. Western R. R. Co.*, 8 N. Y. 175 [69 Am. Dec. 476]; *Ryan v. Fowler*, 24 Id. 410 [82 Am. Dec. 315]; *Fifield v. Northern R. R.*, 42 N. H. 225; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113 [77 Am. Dec. 212]. Upon examination of the cases to which we were referred as more narrowly limiting the liability of the master, we do not find that they establish any different rule. We shall state only a few of the most recent and important, and which upon first view might be thought most nearly to support the defendants' position.

In *Wright v. New York Central R. R. Co.*, 25 N. Y. 562, which was an action by a brakeman on a railroad train for an injury received by him on a collision with another train run by the same corporation, and alleged to have been occasioned by the negligence of the corporation in employing an incompetent engineer and in ill arranging their time-tables, there was no evidence that the arrangement of the time-tables or the incompetency of the engineer contributed to the accident, or even that he was incompetent. In *Hard v. Vermont and Canada R. R. Co.*, 32 Vt. 473, which was an action for an injury to an engineer of the defendants from a defect in one of their locomotive engines, it appeared, and was assumed in the defendants' request for instructions, which the court held

should have been given, not only that the defendants used all due care in the selection of such engines, and of proper and skillful persons to examine and repair them and furnish sufficient and proper materials for that purpose, but also that it was no part of the business of their directors personally to inspect the condition of the engines, and that none of them either knew or suspected any defect in the engine which occasioned the accident; and the plaintiff did not contend or offer any evidence that the defendants or their directors ought to have known of the defect. In neither of these cases is any doubt cast upon the earlier decisions of the same courts, above cited.

In *Tarrant v. Webb*, 18 Com. B. 797, the verdict for the plaintiff was set aside because the jury had been instructed that the master was liable if the servant whose act caused the injury was incompetent, without requiring them to find whether the master knew, or using due care ought to have known, his incompetency; thus in effect holding the master to warrant the competency of his servants, which he was clearly not bound to do. In *Searle v. Lindsay*, 11 Com. B., N. S., 429, the injury happened on a steamer while on a voyage from a defect in machinery which had been in proper condition at the beginning of the voyage, and had been negligently suffered by the engineer of the vessel to get out of repair; and this the owners of the vessel could not have known. In *Waller v. Southeastern R'y*, 2 Hurl. & C. 102, in which the injury happened from the decayed condition of the tree-nails which fastened the chairs to the sleepers on the defendants' railroad, solely by reason of the neglect of duty of the "ganger" or head of the plate-layers, a servant of the defendants, whose duty it was to keep such things in proper repair or condition; in *Lovegrove v. London etc. R'y*, 16 Com. B., N. S., 669, in which the defect was occasioned by the negligence of the servants of the defendants in laying down a temporary tramway; and in *Hall v. Johnson*, 3 Hurl. & C. 589, in which the injury was caused by the negligence of an "underlooker" in the mode of working a mine,—it was not contended that those holding the relation of master towards the plaintiff, namely, the master himself in the last case, and the officers of the corporation in the other two cases, knew of the defect or had been guilty of any neglect whatever; and the principal question argued was, whether the plaintiff and the person whose negligence was the immediate cause of the injury were fellow-servants. And this

was the only question reserved or decided in *Morgan v. Vale of Neath R'y*, 5 Best & S. 570, 736; S. C., L. R. 1 Q. B. Cas. 149.

In the case now before us, the jury were instructed that the plaintiff could not recover without proving,—1. That Shute was incompetent by reason of his habits of intoxication; 2. That his habits were so well known that the officers of the defendants knew or in the exercise of due care would have known them; 3. That Shute was intrusted with the care of the switch by the superintendent or some officer authorized to employ switchmen, or managed the switch habitually or so frequently that the officers, using due care, would know that he had the management of it; 4. That the plaintiff's injury was the direct and immediate consequence of the act of Shute; 5. That the plaintiff used due care, adapted to the circumstances in which he was placed.

As to the first of these requirements, no exception is taken to the instructions. It is indeed objected that the admission of evidence that Shute had the general reputation of being intemperate was erroneous. But such evidence was admitted, as the report expressly states, not for the purpose of showing that he was intemperate, but for the purpose of proving that his habitual intemperance, which there was other evidence tending to prove, was well known in the community. This fact was competent to show that the defendants, if they used due care, must have known that he was habitually intemperate, and therefore an unsuitable servant to be employed by them.

The second point which the plaintiff was required to prove was accurately defined; and the fifth instruction requested was rightly refused, for the reasons already given in discussing the general question of the defendants' liability.

The third and fourth points which the plaintiff was required to prove fully met and covered the first and second instructions requested.

The third and fourth of the instructions requested were also covered by the instructions given, except so far as they suggested that the defendants would not be liable for an injury to which the negligence of the incompetent switchman and the negligence of another servant of the defendants contributed. In that respect, they do not seem to have been applicable to the evidence introduced or the position taken by either party at the trial, and were therefore immaterial. If they had

been applicable to the state of facts in proof, we are not prepared to say that they ought to have been given: See *Cayser v. Taylor*, 10 Gray, 274 [69 Am. Dec. 317]; *Eaton v. Boston and Lowell R. R.*, 11 Allen, 500.

The point taken at the argument that the plaintiff could not recover because he either knew the habits and reputation of Shute, or was negligent in not learning them, was not taken at the trial, and cannot now be raised for the first time.

BIGELOW, C. J., did not sit in this case.

Judgment on the verdict.

INJURIES BY ACTS OF FELLOW-SERVANTS. — Railroad company is not liable to one employee for injuries occasioned by another, where both are engaged in the same common undertaking; and it makes no difference that the injury is the result of negligence of an employee of higher authority, to whom the injured employee is subject, and from the consequences of whose negligence he cannot guard. But the company is liable to an employee for injuries happening to him from the company's negligence in employing incompetent persons in the management of the road and trains, or unsafe machinery in the running of them, or using the road when defective, if the injury actually happens from such causes, and the employee injured has not the same means of knowing of such causes as the employer: *Thayer v. St. Louis etc. R. R. Co.*, 85 Am. Dec. 409. To the same effect is *Durgin v. Munson*, 85 Id. 770; *Louisville etc. R. R. Co. v. Collins*, 87 Id. 486; *Donaldson v. Mississippi R. R. Co.*, 87 Id. 391, and the notes to these cases. This question is further discussed in the notes to *Snow v. Housatonic R. R. Co.*, 85 Id. 720, and *Gilman v. Eastern R. R. Co.*, 87 Id. 635.

THE PRINCIPAL CASE HAS BEEN CITED, and the principles therein discussed reaffirmed, in *Cooper v. Hamilton Mfg. Co.*, 14 Allen, 193-196; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 584, 599; *Huddleston v. Lowell Machine Shop*, 106 Id. 282; *Ford v. Fitchburg R. R. Co.*, 110 Id. 240, 259; *Hill Mfg. Co. v. Providence & N. Y. Steamship Co.*, 113 Id. 495, 500; *Arkerson v. Denison*, 117 Id. 407, 411, 412; *Railroad v. Fitzpatrick*, 31 Ohio St. 479, 485; *Pittsburgh etc. R'y Co. v. Ruby*, 38 Ind. 298, 322; *Hill v. Gust*, 55 Id. 45, 50; *St. Louis etc. v. Valerius*, 56 Id. 511, 520.

DANA v. THIRD NATIONAL BANK OF BOSTON.

[13 ALLEN, 445.]

EQUITABLE ASSIGNMENT. — Check drawn upon a bank for more than the amount of the drawer's funds on deposit creates no lien upon and gives the payee no right to the actual balance until the bank has agreed to pay it *pro tanto*.

THE opinion states the case.

W. S. Dexter, for the defendants.

H. G. Hutchins, for the plaintiffs.

By Court, FOSTER, J. This is an action by assignees in insolvency against a bank to recover the amount on deposit to the credit of the insolvent when the proceedings in insolvency were instituted, namely, October 7, 1865. The defense is, payment of the balance of \$1,060.90 to the holder of a check for \$4,375 drawn September 23d, and presented for payment and dishonored September 25th. The next day the holder demanded payment of the actual balance, offering to indorse it on the check, and to leave that for a voucher. This was then refused. But on October 28th the bank did pay the amount on hand to the check-holder, taking indemnity from him.

We do not refer to the trustee process served on the bank, nor to the circumstances that many other checks were drawn, presented, and dishonored at the same time with the one upon which payment was subsequently made. These facts cannot aid the case of the bank, and might of themselves present serious difficulties in the way of establishing the defense relied upon if it were not defeated upon other grounds. The question to be determined is, whether there was an equitable assignment of the balance on deposit in favor of the holder of the check. If he was entitled in any form to enforce the appropriation of the deposit for his benefit, then the payment by the bank, although subsequent to the proceedings in insolvency, was justifiable, and constitutes a defense to this action.

In *Bullard v. Randall*, 1 Gray, 605 [61 Am. Dec. 433], it was held that a check for a part of the drawer's funds in a bank constitutes no assignment until presented for payment and accepted by the bank. "It was a draft on a bank at sight for a fixed sum, payable out of a general deposit of the drawer, being a larger sum standing to his credit. Such an order is held not to be an assignment." If the present check had been for less instead of more than the amount upon deposit, that case would be an authority precisely in point, for equitable assignments are respected upon trustee process as fully as in proceedings in equity. In *Gibson v. Cooke*, 20 Pick. 15 [32 Am. Dec. 194], it was held that an order upon a trustee by the *cestui que trust* to pay a sum larger than the amount of income in his hands when the order was made and pre-

sented, and not corresponding precisely with the amount payable on any one or more days when the installments of income were to be paid, did not constitute any equitable assignment against the consent of the trustee. The result of this decision is to establish what would seem to be clear on general principles, that the bank was under no obligation to pay a part of the check when not possessed of funds sufficient to pay the whole.

In the present instance, there was at first no consent, but a refusal to pay on account of the check the balance to the credit of the drawer. And this refusal continued until after the commencement of proceedings in insolvency, when the rights of the assignees had intervened, and it was out of the power of the bank and the check-holder to make any arrangement to their prejudice. The two authorities from our own reports are therefore, taken together, decisive against the theory that there was any equitable assignment in favor of the check-holder in the present case. And it becomes unnecessary to decide whether a check drawn for the exact balance in a banker's hands is an equitable assignment thereof, with or without evidence that it was so intended by the parties.

It may be observed that bills of exchange and checks do not stand on the footing of orders drawn upon a particular fund with a manifested intention to create a lien thereupon; and that the tendency and preponderance of authorities seem in favor of the rule that neither a bill of exchange nor a check on a bank can operate as an assignment or appointment of the fund in the drawee's hands, or create any manner of lien upon it; in short, that the drawee owes no duty to the holder of either of these mercantile instruments previous to presentment and acceptance. This rule is supported by considerations of commercial convenience, and may be regarded as a corollary from the one well established, that a bank having funds is liable in damages to a depositor for refusing to pay his check. It was said in *Gibson v. Cooke*, *supra*, that "a draft by the creditor on his debtor in the form of a bill of exchange to the amount of the debt or the whole fund in his hands is a good and valid assignment of the debt or fund." But the remark in the connection in which it stands perhaps only means a draft on a particular fund; and so qualified, it is undeniably correct.

It is enough now to hold that a check drawn upon a bank for more than the amount of the drawer's funds on deposit

creates no lien upon and gives the payee no right to the actual balance until the bank has agreed to pay it *pro tanto*.

Exceptions overruled.

EQUITABLE ASSIGNMENTS. — Draft on bank for fixed sum, payable out of the drawer's general deposit, being a large sum standing to his credit, is not operative as an assignment of the sum named in the draft until it is presented at the bank and payment demanded, although verbally accepted by the cashier when absent from the bank: *Bullard v. Randall*, 61 Am. Dec. 433. To the same effect is *Kimball v. Donald*, 64 Id. 209, and note. Order drawn on particular fund after notice to drawer constitutes equitable assignment, and binds the fund *pro tanto* in the hands of the drawee: *Martin v. Maner*, 70 Id. 223; see also *Wheatley v. Strobe*, 73 Id. 522, and note.

THE PRINCIPAL CASE IS CITED to the point that a check cannot operate as an assignment of the fund upon which it is drawn, or create a lien upon it in the drawee's hands, until it is presented, in *Hancock v. Colyer*, 99 Mass. 187; *Carr v. National Security Bank*, 107 Id. 45, 49; and *Papineau v. Naumburg & Co.*, 126 Id. 372.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

LEE v. LAKE.

[14 MICHIGAN, 12.]

PLAT OF VILLAGE ON WHICH BLOCK IS MARKED "PUBLIC SQUARE," executed, acknowledged, and recorded by one who did not own the property at the time, can have no effect as a dedication under a statute providing for the making, acknowledging, and recording of town plats by the proprietors, even though he afterwards became the owner, in the absence of subsequent circumstances estopping him from asserting the invalidity of the plat.

MERE INEFFECTUAL ATTEMPT TO EFFECT STATUTORY DEDICATION CREATES NO ESTOPPEL in favor of the public; and to raise such estoppel, it must appear that some act was done by the public subsequent to the making of the plat, and in reliance upon it, which would render it unjust for the proprietors afterwards to enforce a right of private ownership.

DEDICATION CANNOT BE MADE OUT WITHOUT CLEAR INTENT TO DEDICATE on the part of the proprietor, and an acceptance of the property by the public.

TRESPASS for injuries to premises in the village of Howell. The defendant, besides pleading the general issue and title in himself, alleged that the premises were a public square. The opinion states the case.

George V. N. Lothrop, for the plaintiff.

C. I. Walker, for the defendant.

By Court, COOLEY, J. The only question presented by the record in this case is, whether the premises in controversy have ever been dedicated to public purposes. The plaintiff claims to be in the rightful possession of them under a lease from F. J. B. Crane, whose title is deduced as follows: The

United States to John D. Pinckney; John D. Pinckney to Edward Brooks and F. J. B. Crane, deed dated July 8, 1836; Edward Brooks to F. J. B. Crane, quitclaim deed dated October 15, 1853.

To show a dedication, the defendant first put in evidence a certified copy of a plat of the village of Howell, recorded in the office of the register of deeds for the county of Oakland, dated and acknowledged the tenth day of November, 1835, by Brooks and Crane as proprietors, upon which is a block marked "public square," which is claimed to include the premises in controversy. The acknowledgment is not in accordance with the statute then in force for the acknowledgment of town plats, but conveyances were afterwards, within the same year, made by Brooks and Crane by reference to the recorded plat, and it is claimed by the defendant that the plat is thereby, and by force of the act of 1850 (Comp. Laws, sec. 1146), which would seem to have been designed to cure imperfections in such acknowledgments, made as effectual to vest in the public the right to grounds designated for public purposes thereon as if the acknowledgment had been in legal form.

Whether a retrospective act of this description could have the effect designed, it does not become necessary to consider in the present case. The plat put in evidence was made by Brooks and Crane at a time when they do not appear to have had any interest in the land; and if the execution had been in all respects in due form, it could not have the effect which the statute gives to plats executed and acknowledged under its provisions. The statute then in force (Laws of 1833, p. 531) provided for the making, acknowledging, and recording of town plats by the proprietors; and it is impossible to give the peculiar statutory effect of a present conveyance to a plat made by persons who at the time had no title to convey, even though they may afterwards have become the owners. And as the healing act of 1850 was confined in its scope to imperfect acknowledgments, it could not give effect to a plat which no acknowledgment could have made effectual at the time it was made.

But as Brooks and Crane afterwards became the proprietors of the town site, it may become a question whether the circumstances do not estop them from asserting the invalidity of the plat. No estoppel, however, could spring from the mere ineffectual attempt to effect a statutory dedication; there must

be circumstances in the case which make it inequitable to take advantage of the defect. No question arises in this case between Brooks and Crane and any of their grantees of lots upon the plat; and before an estoppel could be insisted upon on behalf of the public, it must be made to appear that some act was done by the public subsequent to the making of the plat, and in reliance upon it, which would render it unjust for Brooks and Crane to afterwards assert and enforce a right of private ownership in this square. It becomes important, therefore, to inquire whether any such act on the part of the public is shown; and this question may properly be considered in connection with the subsequent conduct of Crane in reference to the premises, which, together with their use by the public, is supposed to establish a dedication by acts *in pais*.

It appears from the evidence in the case that from the time when the plat was made the premises were commonly called the "public square," and were left uninclosed; that Crane upwards of twenty years ago erected a building upon them, which for a time was occupied by the county clerk and register of deeds for their respective offices; that a religious society also erected another building upon the square, which was used for religious meetings, but also, by consent of the society, and alternately with the village tavern, for the sessions of the circuit court; that this building was afterwards turned into a shop; that twenty years ago a blacksmith shop was put upon the square, though it does not appear how long it remained; that in 1842 the county purchased a court-house square in another part of the village, to which the building containing the clerk's and register's offices, and which had been bought of Crane, was removed; and that for some years past the premises have occasionally been used for public meetings, circuses, ball-playing, fairs, etc. There is evidence, however, that on some occasions when thus used the consent of Crane was applied for and obtained, and also that at times individuals leased of him, or used by his permission, portions of the land for their own purposes.

It can hardly be contended that these facts establish a dedication of the square to the public. A dedication cannot be made out without a clear intent to dedicate on the part of the proprietor, as well as an acceptance by the public: *People v. Jones*, 6 Mich. 176. Leaving out of view the plat and the deeds referring thereto, no act of either Brooks or Crane is put in evidence which indicates an intent on their part to divest

themselves of the ownership and control of this square for the use of the public. All the occupation there has been of the premises has been with an assertion of private right, and the buildings erected have been owned as private property. The county was Crane's tenant in occupying his building for its public offices, and the tenant of the religious society when holding courts in its building. And if the plat evinces an intent on the part of the proprietors to devote this land to public use, it can at most only be regarded in the light of an offer to the public, which, if not accepted, is withdrawn when the proprietors put the land to a use which is inconsistent with the idea that the offer is any longer open.

But the case is entirely barren of evidence of acceptance by the public. We have already seen that the holding of county offices and courts in the buildings upon the square was in subordination to the private ownership, and the use which the public has subsequently made of the premises has not been exclusive in its character, and is only such as the open commons owned by individuals around our villages are always subject to. There is no evidence that any exclusive right was ever asserted by any public authority, and from the time when the court-house and county offices were located in another part of the village, nothing appears from which we can infer an intent to appropriate this square as public property, even if such an intent could have been gathered from the prior use.

It is quite probable that when the plat was made by Brooks and Crane they hoped to obtain a location of the county buildings upon this square; and that when the county authorities decided to locate elsewhere, the decision was looked upon as a refusal to accept the offered dedication. However that may be, and whatever may have been the impression on the part of the public of the nature of the offer made by the plat, it is apparent that the facts proved are inconsistent with any intention on the part of Crane, for several years past, to make the dedication; and that there has been no act on the part of the public which could either amount to an acceptance, or which could bind Crane on the principle of equitable estoppel. The judgment of the court below must therefore be reversed, and judgment be entered in this court for the plaintiff for nominal damages, and the costs of both courts.

CHRISTIANCY and CAMPBELL, JJ., concurred.

MARTIN, C. J. (dissenting). I do not concur with my brethren. I think the dedication in this case is that which is usual, and all that is expected in rural villages by the community, and all required by law: See *City of Cincinnati v. White*, 6 Pet. 431; *City of Logansport v. Dunn*, 8 Ind. 378; *Doe v. Attica*, 7 Id. 641.

TO CONSTITUTE DEDICATION, THERE MUST BE INTENTION OF OWNER TO MAKE GIFT, and also an acceptance thereof: *Gentleman v. Soule*, 83 Am. Dec. 264, and note 269; *Heirs of David v. City of New Orleans*, 79 Id. 586, and note 591; *Rives v. Dudley*, 67 Id. 231, note 240; *Hall v. McLeod*, 74 Id. 400. The principal case is cited to the point that to render a dedication *in pais* effectual, there must be both an intent of the owner to dedicate, and an acceptance of the land dedicated by the proper public authorities: *Detroit v. Detroit and Milwaukee R. R. Co.*, 23 Mich. 209. And if an offer to dedicate is not accepted, it may be withdrawn; and after any considerable lapse of time it must be regarded as no longer open for acceptance, unless the circumstances are such as to make the offer continuous: *County of Wayne v. Miller*, 31 Id. 450. The platting of land into blocks and streets is but an offer to dedicate the lands indicated as streets, and an acceptance on the part of the public is essential to make such streets public highways; and where the public authorities do not within a reasonable time accept such offer to dedicate, the proprietor may again take possession and revoke his offer: *Field v. Manchester*, 32 Id. 281. As to dedication by plat, see also the note to *Weistrod v. Chicago etc. Ry Co.*, 86 Am. Dec. 750.

ACCEPTANCE OF DEDICATION BY PUBLIC MAY BE GATHERED FROM FACTS AND CIRCUMSTANCES, for no particular form or ceremony is necessary: *Cole v. Spruel*, 56 Am. Dec. 696; *Heirs of David v. City of New Orleans*, 79 Id. 586, and cases cited in the note 591; but the acts of acceptance must be plain and unequivocal; thus it is held that acceptance by the public of a dedication of a public square cannot be gathered from the use of the premises by the inhabitants of the town, or by traveling showmen for purposes of amusement, like ball-playing and circus performances, and the use of the land for agricultural fairs is repugnant rather than favorable to the idea of a public acceptance: *Baker v. Johnston*, 21 Mich. 349, citing the principal case.

DEDICATION CAN BE MADE ONLY BY OWNER OF TITLE to the land. A tenant or trespasser cannot dedicate: Note to *State v. Trask*, 27 Am. Dec. 560, 561, wherein also will be found a full treatment of the subject of dedication; *Gentleman v. Soule*, 83 Id. 264; *Rives v. Dudley*, 67 Id. 231. The principal case is cited to the point that deeds referring to a plat, but given before the grantor acquired title, do not bind him as an act of dedication; but if after acquiring the title he makes an unequivocal recognition of the map, this will operate as an affirmation of the original intention of dedication, and give it full force and effect: *Nelson v. City of Madison*, 3 Biss. 248.

TO CONSTITUTE STATUTORY DEDICATION, STATUTORY REQUIREMENTS MUST BE COMPLIED WITH: *Gardiner v. Tisdale*, 60 Am. Dec. 407, and note 422.

BURDENO v. AMPERSE.

[14 MICHIGAN, 91.]

BASIS OF COMMON-LAW DISABILITY OF MARRIED WOMEN rests upon the peculiar disqualifications and burdens of the wife, and not upon any essential element of coverture; and therefore the removal of these disqualifications removes all the reasons which ever required the intervention of equitable trusts in the case of grants between husband and wife.

HUSBAND MAY CONVEY LAND TO WIFE DIRECTLY WITHOUT INTERVENTION OF TRUSTEE where the statutes give power to a married woman to enjoy, contract, sell, transfer, mortgage, convey, devise, or bequeath her property in the same manner and with the like effect as if she were unmarried.

TRESPASS *quare clausum fregit*. The opinion states the case.

Ward and Palmer, for the plaintiff in error.

Larned and Hebden, and William Gray, for the defendant in error.

By Court, CAMPBELL, J. Burdeno sued plaintiffs in error in trespass for alleged wrongful acts upon his freehold, being land covered by water. The suit was for treble damages to Burdeno as proprietor of the land, the statutory action not lying for mere possession: *Achey v. Hull*, 7 Mich. 423. Defendants offered to show that Burdeno had in September, 1861, conveyed the property by deed to his wife, Victoria Burdeno. This deed was objected to as invalid, because of the relation of the parties; and the court below sustained the objection, and rejected the evidence.

The question is presented, therefore, whether as our laws now stand a deed can be made by a husband to his wife. To determine this question, we must see how their relations were governed in this respect before our present system was introduced.

The effect of marriage was to produce what is called in the law books "unity of person"; the husband and wife being but one person in the law: Co. Lit. 112 a; 1 Bla. Com. 442. The wife by her coverture ceased to have control of her actions or her property, which became subject to the control of her husband, who alone was entitled during the marriage to enjoy the possession of her lands, and who became owner of her goods, and might sue for her demands. The wife could neither possess nor manage property in her own right, could make no contract of a personal nature which would bind her, and could bring no suit in her own name,—in short, she lost entirely all

the legal incidents attaching to a person acting in her own right. The husband alone remained *sui juris* as fully as before marriage.

It followed from this legal merger by coverture into a single personalty that the husband could make no grant to the wife, and the wife could make none to the husband. And furthermore, a grant to her by her husband of a freehold would be in effect a grant to take effect *in futuro* (the husband retaining possession for life), and such a grant was unlawful because a freehold could only pass by "livery of seisin, which must operate either immediately or not at all. It would therefore," continues Blackstone, "be contradictory if an estate which is not to commence till hereafter could be granted by a conveyance which imports an immediate possession": 2 Bla. Com. 165. But a husband might make a devise to his wife, "for that such devise taketh no effect but after the death of the devisor": Lit., sec. 168; Co. Lit. 112 a, b. The same incidents of coverture which made the husband sole possessor of his wife's lands led to the rule which made estates in their joint names differ from joint tenancies proper, and regarded the title not as held by moieties, but as an entirety: 2 Bla. Com. 182; Co. Lit. 187 a.

Whether the common-law rule preventing husband and wife from making grants to each other is a rule springing from and inseparably attached to the relation of marriage, or whether it is an incident to the wife's disability to control property in her own right, must guide us somewhat in determining the effect of our enabling statutes. There can be no doubt that there are incidents of marriage independent of all considerations of property. The common-law writers never attempted to classify them, and we must get such light as we can from examples and analogies. It is safe, however, to assume that no act can be absolutely inconsistent with the marriage relation if it has received the sanction of either law or equity. We must therefore see whether the disabilities which applied at common law in cases like the one before us have been regarded as universal and personal disqualifications. Upon this we have an abundance of authority.

There were local customs whereby a wife might take by immediate conveyance from her husband, as, for example, at York: Fitzh. Abr., tit. Prescription, 61; Brown's Abr., tit. Custom, 56 (cited Tomlyn's Law Dict., tit. Baron and Feme). The queen consort may sue and be sued, alone; may take grants

from her husband, as well as from strangers; may take as well as receive grants, and may covenant: Com. Dig., tit. Roy., F, 1. A husband could convey to the use of his wife under the statute of uses, whereby the use vested in her directly as a legal estate, without the action of the feoffee: Com. Dig., tit. Baron and Feme, D, 1, citing Co. Lit. 112 a. And he might, under the same statute, covenant with a third person to stand seised to the use of his wife: Id.

It appears, therefore, that the law did not prohibit a husband from accomplishing for his wife the precise thing which he would have accomplished by a direct conveyance; and it would seem from this that the rule was one of technicality, and not of substance. But there are further illustrations which will throw light upon this subject. When husband and wife were dealing not in their own right, but in a representative character, or what is termed technically, *in auter droit*, either might sell and convey to the other as to a stranger: Co. Lit. 112 a, 187 b; Com. Dig., tit. Baron and Feme, D, 1. It needs no remark to suggest that if the common law was designed to produce unity of will, and to prevent action except by one not under influence or compulsion, no such practice as this could be permitted, for a husband's influence over his wife is personal, and will operate just as strongly in fact in one class of dealings as in another. The rule can only be made sensible by holding that as to matters which a wife could be allowed to hold and manage separately from any interest of her husband, these disabilities of coverture did not exist, or in other words, that they were not regarded as personal only, but as relative to property. Thus far we have considered only such rights as are legal, as distinguished from equitable, and are enforced in all courts alike. But there has grown up by the side of the common law a system of equitable rights and powers which places married women, in regard to property, on the same footing, in most respects, with single women. When property is set apart for the separate use of a married woman, she is, in regard to it, emancipated from the disabilities of coverture, so far as the terms of the trust warrant. This emancipation from her legal disabilities does not depend upon the husband's consent, nor upon any antenuptial agreement. It can be accomplished by any one, relative or stranger, who sees fit to provide a fund for her benefit.

She may sue and be sued concerning it; she may contract concerning it, and her contracts will bind it and be enforced;

she may give it or sell it. Her title is technically an equitable one, and not a legal one; but the trustees are bound to follow her directions, and the distinction is purely formal. The income and proceeds are under her separate control and enjoyment, and her husband has nothing to do with them. Her doings, though not under the dominion or enforcement of courts of law, are recognized by such courts as valid, just as they are recognized and enforced in equity. If the legal disabilities were essential elements of coverture, then equity, which recognizes and follows all the substantial principles of law, could not dispense with them. It would be a gross absurdity for any court to destroy the substantial rights of the husband, or remove his lawful control. And it would be still more absurd to permit this interference at the hands of any meddling stranger at his option. But the doctrine has been long settled that as to her separate estate a wife is on substantially the same footing with a *feme sole*: See *Pybus v. Smith*, 1 Ves. Jr. 189; *Sturgis v. Corp*, 13 Ves. 190; *Essex v. Atkins*, 14 Id. 542; *Wagstaff v. Smith*, 9 Id. 520; *Grigby v. Cox*, 1 Ves. Sr. 518; *Freeman v. Moore*, 1 Brown Parl. C. 237; 1 Hov. Sup. 49, 50; 2 Spence's Eq. Jur. 513; *Jacques v. Methodist Episcopal Church*, 17 Johns. 548 [8 Am. Dec. 447]; 2 Story's Eq. Jur., secs. 1395, 1396.

Not only may she make disposition of it to others, but she may do so also in favor of her husband. The disability of the common law, which arose from the very fact that she was *sub potestate viri* (and which undoubtedly is usually the case as a matter of fact to a great degree), was not considered as existing in equity, which sustained such dealings if fair and not unduly biased: 2 Story's Eq. Jur., sec. 1395; *Essex v. Atkins*, 14 Ves. 542; *Jacques v. Methodist Episcopal Church*, 17 Johns. 548 [8 Am. Dec. 447]; 1 Hov. Sup. 49; and cases above. She can even bargain with her husband concerning her separate estate, and the agreement will be enforced: *Lady Arundel v. Phipps*, 10 Ves. 140; *Livingston v. Livingston*, 2 Johns. Ch. 537; *Wallingford v. Allen*, 10 Pet. 583; *Bullard v. Briggs*, 7 Pick. 533 [19 Am. Dec. 292].

Instead of looking with disfavor upon the settlement of separate property, equity has favored it. A separate estate will not fail for the lack of trustees, and if the legal title comes into the husband's hands, he himself will be held to be a trustee to his wife's separate use, and therefore subject to her orders; and he may be made a trustee expressly: 2 Kent's

Com. 162; 2 Spence's Eq. Jur. 507; *Wallingford v. Allen*, 10 Pet. 583. Not only may a husband settle property to his wife's use through trustees, but he may make himself a trustee by agreement, or even by gift, where he has by some distinct act set apart the property. In *Lucas v. Lucas*, 1 Atk. 270, where a husband caused stock to be transferred to the name of his wife, although at law it would of course continue to be his own property, it was held to have been made his wife's separate fund. So in *Shepard v. Shepard*, 7 Johns. Ch. 57 [11 Am. Dec. 396], and in *Wallingford v. Allen*, above cited, it was held that a conveyance directly from husband to wife should under the circumstances be enforced as valid in equity.

When equity recognizes a power in the wife, who is the disabled party, not only to deal with others, but even to contract with and make provision for her husband out of her separate funds, it can hardly be claimed that the husband, who was always *sui juris*, is restrained by any but technical rules from transferring to her directly. We have seen that equity will enforce even such conveyances. But there never was a time when he could not by his deed put property where she could control it. If it were not that by standing in her name he became legally the owner of the usufruct, there could be no valid reason why any indirection ever need be resorted to. It is not against the policy of the law that the wife should have the real benefit of his gift; and equity, looking through the form at the substance, calls it, as it is in fact, a gift from husband to wife. The doctrine laid down by Coke, in connection with the statute of uses, is of itself sufficient to show that the disability as to conveyances springs entirely from the wife's incapacity to act for herself; and it is stated in 2 Kent's Com. 162, note b, that by the present English statutes a husband is now authorized to make a direct conveyance to his wife.

Our statutes have given power to a married woman to enjoy, contract, sell, transfer, mortgage, convey, devise, or bequeath her property in the same manner and with the like effect as if she were unmarried: 2 Comp. Laws, sec. 3292. Where it stands in trust for her, the trustees are authorized to transfer it to her: 2 Id., sec. 3293. The statute evidently designs to do away with indirect dealings, and make her rights legal instead of equitable. Passive trusts have been entirely abolished, and where a deed creates them, the title passes at once to the beneficiary: 2 Id., secs. 2633-2635. To require a hus-

band (who is not supposed to be under her control or fear) to go through the farce of conveying to some one else, who is at once to pass the property over to his wife, is to keep up a fiction which has not even a legal basis to support it, since the husband has ceased to have possessory claims over her property. He is now in law a stranger to her estate during coverture, instead of its possessor and manager; and his consent is not necessary to her disposal of it: *Farr v. Sherman*, 11 Mich. 33; *Watson v. Thurber*, 11 Id. 457. Whatever protection she may require when dealing with him, he certainly never was supposed to need any against her.

Believing, as we do, that the basis of the common-law disability was in the peculiar disqualifications and burdens of the wife, and that the removal of these removes all the reasons which ever required the intervention of equitable trusts, we think there is now no objection to a deed from husband to wife which should render it invalid.

The court erred in excluding the deed. The other points become immaterial.

Judgment must be reversed, with costs, and a new trial granted.

CHRISTIANCY and COOLEY, JJ., concurred.

HUSBAND MAY MAKE GIFT OR GRANT OF PROPERTY TO HIS WIFE by a conveyance to her directly without the intervention of trustees under enabling statutes: *Story v. Marshall*, 76 Am. Dec. 106, and note 108; and see note to *Cooke v. Bremonde*, 86 Id. 642. This topic is treated in the note to *Wilder v. Brooks*, 88 Id. 54-56. The principal case is cited to the point that a husband and wife may make conveyances directly to each other: *De Vries v. Conklin*, 22 Mich. 259; since the statute of 1855, conferring upon the wife complete authority to act in respect to her estate of every nature *sui juris*: *Ransom v. Ransom*, 30 Id. 329; and when acting with her husband, she need not be examined separately: *Kantrowitz v. Prather*, 31 Ind. 100; the effect of the statute being to make the husband in law a stranger to the wife's estate during coverture, instead of its possessor and manager: *Roberts v. Wilcoxon*, 36 Ark. 370.

CONVERSE v. BLUMRICH.

[14 MICHIGAN, 109.]

LAPSE OF TIME ALONE CANNOT TERMINATE CONTRACTS FOR SALE OF LAND conditioned to be void at the election of the vendor upon the failure of the vendee to fulfill the covenants, conditions, and agreements thereof; for time is not of the essence of the undertaking to pay money by such contracts, and default in payment must be followed by some act of the vendor indicating his election to consider the contract at an end.

RIGHTS OF VENDEE UNDER CONTRACT FOR CONVEYANCE OF LAND upon payment of purchase-money cannot be forfeited by the vendor, though default has been made in the payment of the price, while he has no title to convey, and is not in a position to perform his part of the contract.

ONE WHO PURCHASES TITLE AND RIGHTS OF VENDOR AND VENDEE with knowledge of the equities of a vendee of the latter becomes liable to the same extent and in the same manner as the persons from whom he bought.

FAIR SETTLEMENT OF CONFLICTING CLAIMS BETWEEN PARTIES IS BINDING UPON THEM, though they may have yielded legal rights; and the law should favor and encourage such settlements.

MORTGAGE FOR BALANCE OF PURCHASE PRICE IS VOID AND NOT ENFORCEABLE where it is executed to an assignee of the mortgagor's vendor upon a resale of the land made to the mortgagor by the assignee, who by his acts and statements induced the full belief in the mortgagor, who was not chargeable with notice of the fact, that his rights were paramount to any which the mortgagor could claim under the original contract of sale, and that he had done nothing to recognize or make himself responsible for the original contract of sale, which was untrue; and this arrangement of resale and mortgage, made under such circumstances of fraud, cannot be regarded as a compromise of conflicting claims.

PERSON IS CHARGEABLE WITH CONSTRUCTIVE NOTICE, where, having the means of knowledge, he does not use them. If he has knowledge of such facts as would lead any honest man using ordinary caution to make further inquiries, and does not make, but on the contrary studiously avoids making, such obvious inquiries, he must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would readily have ascertained.

PERSON PUT UPON INQUIRY CANNOT BE BOUND TO DO MORE than apply to the party in interest for information, and will not be responsible for not pushing his inquiries further, unless the answer which he receives corroborates the prior statements, or reveals the existence of other sources of information.

LAW OF CONSTRUCTIVE NOTICE CAN NEVER BE SO APPLIED as to relieve a party from responsibility for actual misstatements and frauds.

ADMISSIONS OF AGENT ARE EVIDENCE AGAINST PRINCIPAL only when they constitute a part of the *res gestæ*. They must accompany the transaction in which the agent acted; and what he states at a subsequent time is inadmissible.

ONE WHO OBTAINS PROPERTY OF ANOTHER BY MEANS OF UNTRUE STATEMENTS, though in ignorance of their falsity, must be held responsible as for a legal fraud; for the court must look at the effect of untrue statements upon the person to whom they are made rather than to the corrupt motive of the one making them.

WHATEVER OTHER RIGHTS COMPLAINANT MAY HAVE CANNOT BE ENFORCED in suit brought for the sole purpose of foreclosing a mortgage if the mortgage fails; and if the complainant retains a vendor's lien, he must bring a separate suit to enforce it.

COMPLAINANT CAN RECOVER ONLY ON CASE MADE BY HIS BILL; and he is entitled to no relief on equities brought into the case only by subsequent pleadings or by evidence.

BILL to foreclose a mortgage. The opinion states the case.

Miller and Wilson, for the complainant.

Miller and Rogers, and George Gray, for the defendants.

By Court, COOLEY, J. The bill in this case was filed against the widow and heirs at law of Wenzel Blumrich, deceased, to foreclose a mortgage given by him to the complainant. The defense is, that the mortgage was procured by fraud and is without consideration.

It appears that on October 25, 1847, the American Baptist Missionary Union, a corporation existing under the laws of Massachusetts, and which then claimed a right to certain premises in Grand Rapids, entered into a contract for the sale of the same to Simeon M. Johnson and Thomas J. Coggeshall for the sum of \$13,500, payable as follows: \$3,000 May 1, 1848, and \$10,500 at the option of said Johnson and Coggeshall, either on said first day of May, 1848, or in six annual payments of \$1,750 each, commencing on the first day of May, 1849, with annual interest. The legal title to the land was then in the United States; and Johnson and Coggeshall were authorized by the contract, at their own expense, to procure a patent in the name of said corporation, and to compromise, adjust, and settle any claim it might have against the United States in respect thereto, and "all claims to said lands and improvements"; and they were to receive a quitclaim deed of the lands when the payments were fully made. The contract also contained a provision entitling the purchasers to a deed whenever the corporation obtained its title, on their giving back a mortgage to secure the unpaid installments, and in that case the corporation agreed to release from the mortgage from time to time any parcels sold by the purchasers, on receiving to be applied on the mortgage the amount for which such parcels were sold. The contract contained no clause of forfeiture.

At this time, the premises were claimed adversely to the corporation by one Turner, and a suit was brought in its name in the United States circuit court against him. But Johnson and Coggeshall proceeded to lay off village lots, and to make sales thereof, for which they gave executory contracts. Among these were three to Blumrich; one dated November 3, 1849, agreeing to convey to him lot 2 in block 2 on the payment of two hundred dollars, as follows: fifty dollars down, and the balance in three annual payments, with interest; the second, dated April 1, 1850, and agreeing to convey to him lot 1 in the

same block on payment of two hundred dollars in similar payments; and the third, dated October 1, 1850, agreeing to convey lot 6 in the same block on the payment of two hundred dollars in four annual payments. The first two of these were given in the name of Thomas J. Coggeshall by George Coggeshall, as his attorney, and the third in the name of Nathaniel Coggeshall by the same attorney. In each it was agreed that a deed should be given conveying the lot when payment was made, and that in case of failure on the part of Blumrich "to fulfill the covenants, conditions, and agreements therein expressed, then such contract to be void at the election of the party of the first part." Blumrich went into possession of these lots, and made valuable improvements upon them.

Johnson and Coggeshall seem to have done very little towards performance of their contract with the corporation, and on May 12, 1853, its treasurer addressed them a letter, stating that Converse was about to visit Grand Rapids, and that he was fully authorized to make any arrangement with them in regard to the lands; expressing the hope that they would arrange for the speedy payment of the notes which they had given for the installments payable by their contract; and requesting them to deliver to him the patent which had been issued to the corporation therefor. Converse called upon them accordingly, and as the result of some negotiation, obtained from Johnson an assignment of all rights which he had under the contract to himself. At this time, four hundred dollars remained unpaid on the three Blumrich contracts.

It will be observed that the Blumrich contracts were not all given by Thomas J. Coggeshall, and that they take no notice of Johnson's interest, though there is some evidence that George Coggeshall acted as agent for him also in making them. There is also some evidence that both the original purchasers had assigned to Nathaniel Coggeshall before this transfer to Converse, but the assignments are not in evidence; and as there is no showing that any of the Coggeshalls disputed Johnson's right, we are probably warranted in assuming that an undivided one half of all rights at that date existing in the original purchasers under their contract with the corporation was transferred to Converse by Johnson's assignment. It becomes important, therefore, to determine what those rights were, and also to ascertain what rights, if any, Blumrich possessed under his contracts at the date of the assignment.

Converse, in his testimony, assumes that he got nothing by the Johnson assignment, because the contract of purchase had become a nullity. This assumption has no better basis than the fact that the purchasers were in default in their payments. It will be seen that the letter from the treasurer of the corporation to Johnson and Coggeshall recognized their contract as still possessing validity. Some question is made of the right of the treasurer to give such a letter, but it is of little importance in this suit, as there is no evidence that any act whatever was done by the corporation to terminate the contract prior to May 1, 1855; and up to that time, Johnson and Coggeshall and their assigns were entitled to compel specific performance of the contract, on making payment. The corporation not only had a right up to that time to demand payment of the purchase-money, but was actually seeking to obtain it; and it was not authorized to treat the contract as void, so far as it imposed obligations upon the vendor, and still enforce it against the vendees. All the acts of the corporation show that a forfeiture of the contract was neither attempted nor desired; but that the intention was to deal with the vendees with indulgence and liberality. It seems like supererogation to say that the vendees and their privies were not entitled to insist that the contract should be forfeited, for their own default, against the wish of the corporation; but the position of Converse in this case seems to require the statement.

The contracts of Blumrich were also in full force when the assignment was made by Johnson; for though Blumrich was then in default in his payments, the Coggeshalls had never seen fit to exercise the option, reserved to them by the contracts, to forfeit them. The lapse of time alone could not put an end to them; for time is not of the essence of the undertaking to pay money by such a contract: *Wallace v. Pidge*, 4 Mich. 570; *Bomier v. Caldwell*, 8 Id. 463; *Morris v. Hoyt*, 11 Id. 9; *D'Arras v. Keyser*, 26 Pa. St. 249; *Young v. Daniels*, 2 Iowa, 126 [63 Am. Dec. 477]; *Jones v. Loggins*, 37 Miss. 546; and default in payment [is] required to be followed by some act of the vendor indicating his election to consider the contract at an end before it would be terminated: *Chrisman v. Miller*, 21 Ill. 227; *Moore v. Smith*, 24 Id. 512; *Brink v. Morton*, 2 Iowa, 411; *Young v. Daniels*, 2 Id. 126 [63 Am. Dec. 477].

Whether Blumrich was in position at this date to enforce his contracts against any one but the holder of the Coggeshall

interest might depend upon facts not sufficiently explained by this record. The question was made immaterial by subsequent transactions. It seems, however, that Converse recognized the Coggeshall contracts, for he made the following indorsement upon a list of them, which he gave to George Coggeshall: "I hereby covenant and agree to convey, by quit-claim deed, to George Coggeshall, Esq., for all the within described lots of land, when the balance due on said lots is paid to me, with the interest at seven per cent per annum from the dates as specified above. Grand Rapids, June 3, 1853. J. W. Converse." The Blumrich contracts are specified in this list. There is again at this point a want of full explanation, and the consideration for this instrument does not perhaps sufficiently appear, though it was in some way connected with the purchase from Johnson, and would seem to have been required as a condition of the assignment. Converse testifies that it was given only to protect George Coggeshall against the claims of those who had taken contracts from him as agent, and fulfilled them; and he assumes that the understanding expressed by this paper is confined to such contracts; but his mistake on this point is apparent on inspection of the paper, which by its terms authorizes payment to be made by the purchasers on all the contracts mentioned in the list.

June 23, 1854, an agreement was entered into between Converse of the one part, and Turner and Patterson, his attorney, of the other, purporting to settle the suit in the United States circuit court. This agreement recited that Converse had purchased the lands of the Missionary Union, and was the real party in interest in the suit; and it provided that the lands should be divided between the parties in the proportions of one half to Converse and one fourth each to Turner and Patterson. The only purchase which Converse had really made up to this time was the one from Johnson; but he swears that he was expecting to make a purchase of the corporation "independent of the contract." He testifies that he was not acting for the corporation in this settlement, and had no authority so to do; and whatever he may have expected to do in the future, it is quite apparent that he was then acting under the contract, and in pursuance of the authority acquired by Johnson's assignment.

Converse testifies to subsequent negotiations with the corporation, and to an unwillingness on the part of its officers to

convey to him until the old contract was out of the way. He therefore made an arrangement by which on the first day of May, 1855, he obtained an assignment from Thomas J. and Nathaniel Coggeshall of all their claims under the original contract. This assignment contained the following clause: "And I do hereby constitute the said James W. Converse my attorney, in my name, but to his own use and behoof, and at his own cost, risk, and expense, to take all necessary and lawful steps for the complete recovery, enjoyment, use, benefit, and control of the rights and privileges guaranteed by said contract to me, for his own use and disposition, with full powers of substitution."

On the same day, Converse obtained a deed from the corporation. The original contract between the corporation and Johnson and Coggeshall was put in evidence in the case, with the word "canceled" upon it; but when or by whom this was written does not distinctly appear, though the fair inference from all the circumstances is, that it was done at the time of the giving of the deed to Converse.

Blumrich was still in default four hundred dollars on his contracts, and there is evidence that at one time he was advised by Patterson not to pay, because of the Turner claim to the land; and that he had said he should not do so. But not only had his vendors never elected to terminate his contracts, but no person had up to this time been in a position to do so. Equity could not allow the rights of a purchaser under such a contract to be forfeited by the vendor when the latter had no title to convey, and was not in position to perform his own undertaking.

The testimony of Converse was taken at great length in the case, and he gives his version of the understanding between the parties as to the effect which the various instruments should have. A large portion of this testimony was intended to vary or explain the legal effect of the writings, and was therefore inadmissible; and when he testifies that his purchase from the corporation "was entirely independent of and separate from the Johnson and Coggeshall contract," he is distinctly at variance with the facts. If he so understood the transaction, it is remarkable that everything actually done by himself assumed that contract to be in force, and that he was acquiring rights under it. He paid a considerable sum for the assignments,—fifteen hundred dollars to Johnson and five hundred dollars to Coggeshall,—and as by means of them he

entitled himself to the benefits of the original contract, so also must he be held to have assumed their burdens. By receiving the assignments and the deed, he became assignee of both the corporation and its vendee; so that, while he had a right to claim the title under the former, he became bound to perform the contracts of the latter with their vendees. Buying with knowledge of equities in these vendees, he became liable to the same extent and in the same manner as the persons from whom he bought: *Le Neve v. Le Neve*, 3 Atk. 646, and notes thereto in 2 Lead. Cas. in Eq. 117 et seq.; *Taylor v. Stibbert*, 2 Ves. 438; *Daniels v. Davison*, 16 Id. 249. Unless a deed from the corporation to Johnson and Coggeshall would have deprived Blumrich of his right to perform, a deed of Converse after he had taken their assignments could not have that effect.

But while Converse succeeded to the obligations of Johnson and Coggeshall, and of each of them, in respect to the Blumrich contracts, he also became vested with their rights, among which was the right to terminate the contracts at his election for default in payment. He saw fit, however, not to assert this right; but instead thereof, to give out and claim that he knew nothing of the contracts, and was in no manner bound to recognize or respect them, because his purchase was an original one from the Missionary Union, and wholly independent of the previous purchase. The Blumrich contracts are therefore still in force, unless put an end to by Blumrich himself in the transaction which resulted in giving the mortgage now in controversy. It is claimed by complainant that they were, inasmuch as Blumrich entered into the arrangement, if not with full knowledge of all the facts, at least with such information respecting them as should operate as constructive notice.

- There is no evidence that Blumrich was apprised of the negotiations between Converse and the original purchasers, or of the memorandum given by Converse to George Coggeshall in respect to the contracts which had been made. Converse, Turner, and Patterson, immediately after entering into the agreement among themselves, gave out and claimed that they had a right to disregard entirely the contracts before made with Coggeshall, and they required of purchasers from him that they should either receive pay for their improvements, and surrender the lots, or else make a new purchase of them at such price as should be agreed upon. Blumrich for a long time refused to make any arrangement, though he expressed a

readiness to pay the amount due on his contracts; but at length, on June 1, 1857, he entered into a new contract with Converse, by which he agreed to purchase the same lots at the price of eighteen hundred dollars, paying three hundred dollars down, and three months later giving the mortgage now in suit for the remaining fifteen hundred dollars. The arrangement was made with Converse by the aid of one Koch, who, though not then an attorney, acted as legal adviser of Blumrich in making it. The testimony of Koch was taken in the case, and though differing from that of Converse in some respects, the differences are not so material as in any way to affect the legal aspects of the case.

Koch testifies that he went several times to see Converse, and asked him if he would recognize the Blumrich contracts. Converse replied that he knew no such contracts, and if there were any, he had nothing to do with them, was under no obligation to respect them, and would not respect them. He also said if Blumrich did not buy the lots of him, he would dispossess him. Blumrich, after long parleying and appeals, based on his poverty and large family, at last entered into the arrangement on the terms dictated by Converse, and the latter informs us that after the papers were drawn Blumrich shook him by the hand, and expressed his gratitude at the liberality with which he had been treated. No more conclusive evidence could be given how thoroughly Blumrich was deceived, both as to his rights under the contracts and as to the facts of the case.

Complainant now seeks to support this mortgage as given on a compromise of their respective claims. Undoubtedly, where a fair settlement of conflicting claims is made between parties, it is binding upon them, even although they may have yielded legal rights; and the law should favor and encourage such settlements. But we have no doubt whatever that this mortgage was given by Blumrich in the full belief, induced by the acts and statements of Converse, that the rights of the latter were independent of and paramount to any which could be claimed under the original contract, and that he had done nothing to recognize or make himself responsible for the sales by Coggeshall. The statements by Converse on this point were not mere expressions of opinion by him: they were statements of facts, and if untrue in material particulars, Blumrich is entitled to have the mortgage procured by them set aside as obtained by fraud, unless he was at the time chargeable

with such notice of the facts as should preclude him from complaining.

It can hardly be necessary to consider the doctrine of constructive notice at length in disposing of this case. A person is chargeable with constructive notice where, having the means of knowledge, he does not use them: *Mayor etc. v. Williams*, 6 Md. 235. If he has knowledge of such facts as would lead any honest man using ordinary caution to make further inquiries, and does not make, but on the contrary studiously avoids making, such obvious inquiries, he must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would readily have ascertained: *Whitbread v. Boulnois*, 1 Younge & C. 303. But he cannot be bound to do more than apply to the party in interest for information, and will not be responsible for not pushing his inquiries further, unless the answer which he receives corroborates the prior statements, or reveals the existence of other sources of information: *Holmes v. Stout*, 10 N. J. Eq. 419; *Williamson v. Brown*, 15 N. Y. 354. Blumrich, receiving information which led him to infer that Converse had become chargeable with the obligations of Coggeshall's contracts, applies to Converse to ascertain the facts, and is distinctly informed by the latter that he knows nothing of such contracts, and has never obligated himself in any way to respect them. As between himself and Converse, Blumrich had fully discharged his duty by making the inquiry; and the former will not be heard to claim that Blumrich should have received and acted upon the prior information instead of the positive statements made by himself to the contrary. When one seeks the best authority to ascertain the truth of rumors, and is there misled, the person misleading him can hardly be allowed to support rights by insisting that he should still be chargeable with the reports which he had endeavored in vain to verify. The law of constructive notice can never be so applied as to relieve a party from responsibility for actual misstatements and frauds.

But it is also said that Koch, who acted as counsel for Blumrich, was fully aware at the time of the agreement which Converse had given to Coggeshall in reference to these contracts; and on the familiar principle that notice to an agent is notice to his principal, Blumrich, it is claimed, is as fully bound by his settlement as if he had personally known of that agreement at the time. Without stopping to consider how far this may fall within the principles just stated, we may content our-

selves with saying that there is no legal evidence to establish such knowledge by Koch. The fact was sought to be proved by a letter from Koch to Converse, dated June 19, 1857, written in the endeavor to make an arrangement for another party. In this letter Koch refers to the agreement from Converse to Coggeshall as follows: "I all the while knew that there was a writing in the hands of a certain person, of Mr. Converse, in which it was promised to convey and recognize these contracts," etc. As the date of this letter is only eighteen days after the settlement with Blumrich, the inference is drawn that Koch must have known of the writing he refers to at that time. Koch positively denies such knowledge.

But this letter of Koch is no evidence of the fact as against Blumrich. There is no ground upon which it would be claimed to be affirmative evidence, except as an admission of Blumrich's agent. But the admissions of an agent are only evidence against the principal when they constitute a part of the *res gestæ*. They must accompany the transaction in which the agent acted; what he states at a subsequent time is inadmissible: *Thalhimer v. Brinckerhoff*, 4 Wend. 394 [21 Am. Dec. 155]; *Hubbard v. Elmer*, 7 Id. 446 [22 Am. Dec. 590]; *Vail v. Judson*, 4 E. D. Smith, 165; *Fogg v. Child*, 13 Barb. 246; *Budlong v. Van Nostrand*, 24 Id. 25. The rule that would allow an agent, after a transaction is closed, to admit away the rights of his principal, would be too dangerous to be tolerated for a moment: *Benedict v. Denton*, Walk. Ch. 336; *Horner v. Fellows*, 1 Doug. (Mich.) 51.

There are two very significant facts in this case to which we have not yet alluded. One of these is, that Converse, while claiming not to have recognized the Blumrich contracts, actually, through George Coggeshall as his agent, received interest upon them in March and May, 1854, settling the accounts therefor in April, 1856. This not only recognized the contracts, but treated them as in force at the time these payments were made. It does not appear, nor is it likely, that Blumrich when making them supposed Coggeshall was acting in any different capacity than when he made the contracts; but it now appears that he was acting as agent for and paying over the money to Converse, notwithstanding the positive assurances of the latter that he had never recognized the contracts upon which he was thus receiving payments.

The other item of evidence referred to is an indorsement made by George Coggeshall on the list of contracts upon

which Converse's agreement to him had been written, in these words: "It is hereby understood and agreed this day that Mr. Converse is not to give any deeds on any bonds that have reverted. 11 May, 1855." The date of this is ten days after Converse acquired his deed from the Missionary Union, and it will be seen that it modifies the agreement of Converse of June 3, 1853, by which he had promised to convey all the contracted lots. Why this indorsement was made, unless for the purpose of narrowing the obligation which Converse supposed to rest upon him, we are unable to perceive. The date is significant, as being coincident in time with the claim set up by Converse to disregard the Coggeshall contracts, and its peculiar wording shows that the real ground on which the parties then supposed they might treat them as null was the default which had been made in payment, by means of which, to use their term, they had "reverted."

Objections were taken by complainant to some portion of defendants' evidence, but we have not deemed it important to examine them, since the equitable right of defendants to relief clearly appears from the statements of Converse himself upon the stand. We have carefully in the course of our opinion abstained from speaking of the acts of complainant as intentionally dishonest, and from characterizing them with harshness. We have been obliged to say of his statements that they were untrue, and made on his part with knowledge that they were so. But we will not undertake to say that he did not convince himself by some process of reasoning that they were correct. The legal aspect of the case would not be different if we came to that conclusion, since the courts must look at the effect of untrue statements upon the person to whom they are made, rather than to the corrupt motive of the one making them. If one obtains the property of another by means of untrue statements, though in ignorance of their falsity, he must be held responsible as for a legal fraud: *Ainslie v. Medlycott*, 9 Ves. 21; *Taylor v. Ashton*, 11 Mees. & W. 401; *Smith v. Richards*, 13 Pet. 26; *Lockridge v. Foster*, 4 Scam. 569; *Smith v. Babcock*, 2 Wood. & M. 246; *Tuthill v. Babcock*, 2 Id. 298.

As the lots purchased were deeded by Converse to Blumrich, it might be desirable to end all litigation between the parties by enforcing payment of the balance due to Converse by decree in this suit if we could properly do so under the pleadings. But the bill is filed for the sole purpose of foreclosing the

mortgage; and whatever other rights complainant may have, they cannot be enforced in this suit if the mortgage fails. It has been several times held by this court that the complainant can only recover on the case made by his bill; and he is entitled to no relief on equities only brought into the case by subsequent pleadings or by evidence: *Peckham v. Buffam*, 11 Mich. 529; *Perkins v. Perkins*, 12 Id. 456; *Moran v. Palmer*, 13 Id. 367. Undoubtedly the complainant retains a vendor's lien upon the land, which he may enforce in equity if defendants refuse to pay: *Carroll v. Van Rensselaer*, HARR. (Mich.) 225; *Palmer, Appellant*, 1 Doug. (Mich.) 422; *Sears v. Smith*, 2 Mich. 243; *Mowrey v. Vandling*, 9 Id. 39; but it must be enforced in a suit brought for that purpose.

The decree of the court below must be reversed, and the complainant's bill dismissed, with costs of both courts.

CAMPBELL and CHRISTIANOY, JJ., concurred.

MARTIN, C. J., did not sit in this case.

GRANTER WHO TAKES LAND WITH FULL KNOWLEDGE OF CIRCUMSTANCES under which his grantor acquired title takes it subject to all the equities which existed against it in the hands of the grantor: *Tapley v. Tapley*, 88 Am. Dec. 76.

TIME, WHEN OF ESSENCE OF CONTRACT TO CONVEY LAND: *Young's Adm'r v. Rathbone*, 84 Am. Dec. 151, and note 155.

WANT OF TITLE IS GOOD DEFENSE TO ACTION BY VENDOR FOR PRICE: *Bunkle v. Johnson*, 83 Am. Dec. 191, and note 192; see *Brown v. Manning*, 74 Id. 736, and note 739; *Lloyd v. Farrell*, 86 Id. 563, and note 568.

FAILURE OF OBLIGEE IN BOND FOR TITLE TO PAY PURCHASE PRICE AGREED does not absolutely and of itself put an end to the contract: *Walker v. Emerson*, 73 Am. Dec. 207, and note 210.

FAIR COMPROMISE OF DOUBTFUL CLAIMS is favored by the courts: See *Leach v. Fobes*, 71 Am. Dec. 732, and note 734. It is a sufficient consideration for a promise, no matter on whose side the right ultimately proves to be: *Cassell v. Ross*, 85 Id. 270, and note 277; *Miller v. Betill*, 67 Id. 303; *Weed v. Terry*, 45 Id. 257; but see *Schnell v. Nell*, 79 Id. 453; and will not be set aside except for fraudulent misrepresentations or concealment of facts, or for such imposition as amounts to unfair or unconscientious dealing: *Mills v. Lee*, 17 Id. 118; *Schnell v. Nell*, *supra*.

WHATEVER WILL PUT PURCHASER UPON INQUIRY, and lead to knowledge, is notice. He is bound to make inquiry where there is anything that would lead a prudent man to make it; and he is therefore presumed to have known all that inquiry would have revealed to him: *Gibson v. Winslow*, 84 Am. Dec. 552, and cases cited in the note 556; *Galland v. Jackman*, 85 Id. 172, and note 177. He must prosecute his inquiries in a proper manner, and will be bound by notice of an encumbrance when informed of its existence, notwithstanding the party whose interest would prompt him to misrepresent should inform him that the encumbrance was paid off or discharged, without, however,

furnishing any proof of the fact: *Price v. McDonald*, 54 Id. 657. But a party who is put upon inquiry by notice is not bound at his peril to assume that the notice asserts the facts; and if he is reasonably diligent in obtaining information from the sources likely to supply it, and obtains none, he deprives the notice of all force: *Barnard v. Campau*, 29 Mich. 165, citing the principal case. No one can take advantage of his own fraud: *City Bank of New Haven v. Perkins*, 86 Am. Dec. 332, and note 339; *Munson v. Hallowell*, 84 Id. 582.

DECLARATIONS OF AGENT ARE ADMISSIBLE AGAINST PRINCIPAL if made as part of *res gestæ*, in the execution of his agency: *Tuttle v. Brown*, 64 Am. Dec. 80, and note citing prior cases 83; *Coweta Falls Mfg. Co. v. Rogers*, 65 Id. 602, note 606.

NEITHER KNOWLEDGE OF FALSITY OF REPRESENTATION, nor the presence of circumstances manifesting a recklessness of truth, is an indispensable ingredient of fraud. Any representation by the vendor of land in regard to a material fact, which operated as an inducement to the purchase, upon which the vendee had a right to rely, and by which he was actually deceived and injured, is fraud: *Footer v. Kennedy's Adm'r*, 81 Am. Dec. 56, and note 58; and see *Belford v. Crane*, 84 Id. 155; *Alvarez v. Brannan*, 68 Id. 274, and note 280. A man is bound by his positive and unequivocal assertions of fact, and is bound to make good the consequences of their falsehood. And when he asserts as true what he has reason to believe false, and gives no qualification to show that he is not speaking positively and from knowledge, there is no sense or justice in exempting him from responsibility: *Stone v. Covell*, 29 Mich. 364, citing the principal case. For the law must have regard rather to the effect of untrue statements in inducing parties to act than to the motive with which they were made. The fraud consists in a party being induced to act to his prejudice by untruthful statements made by another upon whom he had a right to rely, and whose duty it was, in response to inquiries, to state the case truly: *Detroit v. Weber*, 26 Mich. 288; *Becke v. Knapp*, 28 Id. 76, citing the principal case.

DECREE IN EQUITY MUST CONFORM TO CASE MADE OUT BY PLEADINGS: *Evans v. Gibson*, 77 Am. Dec. 565. See also *Codrington v. Mott*, 82 Id. 258, upon the allowance of amendments in equity.

WALLACE v. FINNEGAN.

[14 MICHIGAN, 170.]

DEFENDANT MAY SET OFF NOTE OF PLAINTIFF WITHOUT SURRENDERING COLLATERAL SECURITIES, since his right to sue on the note is an absolute one, not in any way affected by his possession of the securities, and a court of law has no power to enforce such equities in the securities as may result to the plaintiff from the allowance of the set-off. -

PERSON HOLDING COLLATERAL SECURITIES IS NOT BOUND TO RESORT TO THEM before suing upon his principal claim, but when that claim is satisfied, he may be compelled to release or reassign the collaterals.

NOTHING CAN BE SET OFF UNLESS IT CAN BE SUED UPON; and any claim coming within the statute can be set off if it can be sued.

IF AFTER ALLOWING SET-OFF OF NOTE SECURED BY COLLATERALS defendant is still found in debt to plaintiff, the latter has other remedies to recover

the collaterals if the defendant should see fit to withhold them; but if the set-off brings the plaintiff in debt, the defendant may properly hold them for the balance.

ASSUMPSIT on the common counts. The defendant pleaded the general issue, and gave notice of set-off. The set-off was rejected by the court, and judgment was rendered for the plaintiff. In other respects, the opinion states the case.

D. D. Hughes, for the plaintiff in error.

F. Muzzy, for the defendant in error.

By Court, CAMPBELL, J. The only point which is very clearly presented by the bill of exceptions in this case is, whether a note held by the defendant below was properly rejected when offered as a set-off unless certain collaterals should be surrendered. The defendant below received from Finnegan as security to this note of \$450 an assignment of certain other notes secured by a real-estate mortgage. The assignment was absolute in form, but was accompanied by a defeasance which provided that if Finnegan paid the \$450 note at maturity the securities should revert to him, but if not they were to become the absolute property of Wallace. This assignment itself was in effect a real-estate mortgage, and subject to a similar equity of redemption, and left the \$450 note an existing liability as before: *Graydon v. Church*, 7 Mich. 36. A person holding a collateral security is not bound, unless he chooses, to resort to it before suing upon his principal claim. When that claim is satisfied, he may be compelled to release or reassign the collaterals, but his right to sue the claim itself is an absolute one, not in any way affected by his possession of the securities, and he cannot, therefore, be compelled to surrender them as a condition of enforcing his legal demand. Nothing can be set off unless it could be sued upon; and on the other hand, any claim coming within the statute can be set off if it could be sued. A court of law has no power to enforce such equities as may result to Finnegan in the securities from the allowance of the set-off; and even if it had this power the court could not assume that the entire verdict might not be in Wallace's favor. If after allowing the set-off, Wallace is still found in debt to Finnegan, the latter has other remedies to recover the collaterals if Wallace should see fit to withhold them. But if the set-off brings Finnegan in debt, Wallace may properly hold them for the balance. There was error in refusing to allow the set-off without a surrender of

the securities, and Wallace was not bound to surrender them as a condition of its allowance.

The charge upon other points is very obscure, but as it is somewhat difficult to apprehend its precise bearing, we shall not attempt to review it, as the case goes back upon the question of set-off.

Judgment must be reversed, with costs, and a new trial must be granted.

CHRISTIANCY, J., and MARTIN, C. J., concurred.

COOLEY, J., did not sit in the case.

TAKING COLLATERAL SECURITY FOR PAYMENT OF DEBT AFFORDS no implication that creditor is to look to it only or primarily for the payment of the debt. The debtor's obligation to respond in his person and property is the same as if no security had been given: *Rogers v. Ward*, 85 Am. Dec. 710. *Robinson v. Hawley*, 79 Id. 497, and note 500, 501, discussing this subject.

SET-OFF WILL BE APPLIED ON UNSECURED RATHER THAN SECURED CLAIMS presented by the same creditor against a decedent's estate, and the representative of the deceased debtor cannot require its application to the secured debts: *Putnam v. Russell*, 42 Am. Dec. 478.

LEGAL CLAIMS ONLY CAN FORM SUBJECTS OF SET-OFF, or be filed in bar to any action at law; they must be such as the party could sue for and recover at law: *Millburn v. Gayther*, 50 Am. Dec. 681, and note 685; *Annex v. Hensch*, 45 Id. 122.

LEWIS v. CAMPAU.

[14 MICHIGAN, 458.]

ORDER APPOINTING RECEIVER IS IN EFFECT FINAL DECREE, though purporting to be interlocutory, and is therefore appealable where it is made upon a bill filed in aid of proceedings at law to remove administrators and praying the appointment of a receiver to take charge of the assets until the termination of the proceedings at law.

DIFFERENCE BETWEEN INTERLOCUTORY AND FINAL DECREES is that in the former some further steps are required to be taken to enable the court to adjudicate and settle the rights of the parties, while under a final decree the party obtains his rights without any further adjudication on the merits, either by the direct operation of the decree itself, or by means of proceedings of a ministerial character in execution of it.

DECREE TO BE FINAL NEED NOT DISPOSE OF ALL MERITS; but whenever the court finally adjudicates any part of them, although the practice of making separate decrees without necessity is very reprehensible, yet the partial decree is neither void nor interlocutory.

PARTY IS NOT TO BE DEBARRED FROM HIS RIGHT OF APPEAL FROM FINAL DECREE merely because it is partial and prematurely made.

ISSUANCE OF PRAYER FOR REMOVAL OF ADMINISTRATORS IN BILL filed in aid of proceedings at law to remove the administrators for the purpose

of having a receiver take charge of the assets pending the legal proceedings, being inconsistent with the case made by the bill, cannot change the ancillary nature of the suit.

BILL in equity praying the appointment of a receiver, and other relief. The opinion states the case.

C. I. Walker and A. B. Maynard, for the complainant.

G. V. N. Lothrop, for the defendants.

By Court, CAMPBELL, J. This is a motion to dismiss an appeal on the ground that the order appealed from is neither a decree nor a final order within the statute regulating chancery appeals.

The bill was filed by Lewis, setting forth that he had applied for the removal of such of the defendants as are administrators of the estate of Joseph Campau, deceased, and that from the decree of the probate court refusing such removal he had appealed to the Wayne circuit court, where this bill was presented. He avers also the alleged facts of misconduct in the management of the estate, and improper charges in the accounts, which are also under litigation, and prays for a receiver to take entire charge of the property in the hands of the administrators until the question of their removal is settled.

The bill is a bill in aid of the appeal proceedings, and the relief asked is entirely ancillary so far as the appointment of a receiver is concerned. There is no fund in the hands of the court, as a court of chancery, to be administered in this cause, to which the appointment of a receiver might be incidental; and there is no prayer in the bill asking such an appointment, except as the relief desired on the merits.

Within a few days after the bill was filed, and before any answer was put in, and before the subpoena was returnable, notice was given of a motion for a receiver, in precise accordance with the prayer of the bill. Upon this motion, an order was made appointing such receiver to act until further order, and enjoining the administrators from further meddling with the estate, reserving the question of costs and further directions until the final hearing. This is the order appealed from.

It is claimed by complainant that this is a purely interlocutory order, and therefore not open to appeal.

The statute restricts the right of appeal to decrees and final orders, and the settled meaning of the term "decree" in this

sense is determined to embrace only such decrees as are not interlocutory. The difference between interlocutory and final decrees is this: that in the former some further steps are required to be taken to enable the court to adjudicate and settle the rights of the parties; while under a final decree the party obtains his rights without any further adjudication on the merits, either by the direct operation of the decree itself, or by means of proceedings of a ministerial character in execution of it. But it is not necessary that a decree should dispose of all the merits. Whenever the court finally adjudicates any part of them, although the practice of making separate decrees without necessity is very reprehensible, yet the partial decree is neither void nor interlocutory.

Nor can it make any difference at what stage of the cause such a decree is made. It is contrary to justice and sound practice to condemn a defendant before he is heard, but if his rights are passed upon and affected prematurely, he is not to be debarred from his appeal because the decree was unauthorized. This would enable his adversary to take advantage of his own wrong.

In the present case, the question raised by the bill, and which the defendants were entitled to have decided upon the merits by legal proof, was, whether by their conduct they had rendered it necessary, for the safety of the parties concerned, to have the estate in their hands taken from the legal custodians, and held until it should be determined whether they should be removed from office in a proceeding on the law side of the court; for although there is a prayer in this bill for their removal, complainant shows that he himself is urging those proceedings with which this prayer is inconsistent. This order for a receiver decides the whole merits, and takes away the property from its legal owners without waiting the developments of the pleadings and proofs. The mere fact that the receiver is to act only until further orders does not change its character, for such must always be the legal position of a receiver, who is but a representative of the court. The point in controversy was, whether the court should take charge of the fund at all.

We think the order, although professedly interlocutory, is in fact a decree, and that the appeal is properly brought. The motion to dismiss must be denied, with ten dollars costs.

COOLEY and CHRISTIANCY, JJ., concurred.

MARTIN, C. J. (dissenting). I do not concur with my brethren in this case. The bill was filed to remove administrators, and for the appointment of others,—asking for the appointment of a receiver and an injunction until the final hearing. The receiver was appointed, and an injunction granted upon an interlocutory motion. The final hearing has not yet been had; and the question of costs and further directions is expressly reserved until the final hearing. How this can be regarded as a final decree under the rulings in this state, I am at a loss to conceive: See *Lathrop v. Hicks*, 2 Doug. (Mich.) 228; *Caswell v. Comstock*, 6 Mich. 391; *Blackwood v. Van Vleet*, 10 Id. 398.

I think the motion should be granted.

FINAL AND INTERLOCUTORY JUDGMENTS AND DECRETES, WHAT ARE.—This subject is treated at length in the note to *Williams v. Field*, 60 Am. Dec. 427-439, discussing orders appointing receivers at page 433; see also *West v. Bagby*, 62 Id. 512; *Holt v. Wood*, 76 Id. 72. The principal case is cited to the point that an order which decides merely a portion of the case upon the merits is final and appealable: *Kingsbury v. Kingsbury*, 20 Mich. 213; and it is held, in *Barry v. Briggs*, 22 Id. 201, 205, citing and following the principal case, that an order appointing a receiver to take charge and dispose of all the property held by the defendant as surviving partner of a firm is an order divesting the entire legal estate of the defendant in the property over which he had the exclusive control as well as exclusive title; and such an order is a decree from which an appeal lies, whatever may be the stage of the cause in which it is made. And in *Merchants' etc. Bank v. Kent*, 43 Id. 296, it was said, upon the authority of the principal case and *Barry v. Briggs*, 22 Id. 201, that an order, in so far as it enjoined the bank from interfering by replevin suit with the possession of property to which the bank claimed title, inasmuch as it finally took from the bank a legal right, was in the nature of a final order, and was appealable.

PRAYER MAY BE FRAMED IN ALTERNATIVE when the complainant is in doubt as to which of two kinds of relief he is entitled to upon the facts stated in his bill: *Lloyd v. Brewster*, 27 Am. Dec. 88, and note 90; but the relief prayed must be consistent with the case made by the bill; and on the other hand, no relief inconsistent with that specifically prayed for can be granted, though it may be consistent with the case stated: *Colton v. Rose*, 22 Id. 648, and note 652. The principal case is cited to the point that the scope of a bill which is merely auxiliary to an action of ejectment will not be enlarged by the phraseology of its prayer, and however comprehensive or inconsistent the terms of the prayer may be, the limited jurisdiction of the cause is not altered or the scope of the case enlarged; and such inconsistencies in the prayer are therefore of no importance: *Livingston v. Hayes*, 43 Mich. 133.

EDWARDS v. CHANDLER.

[14 MICHIGAN, 471.]

TO RECOVER IN ACTION OF LIBEL WHERE COMMUNICATION IS PRIVILEGED, the plaintiff must prove affirmatively not only the falsehood of the communication, but that it was published with express malice.

TRUTH OF COMMUNICATION IN ACTION OF LIBEL IS MERELY CONTRADICTION OF ESSENTIAL PART of plaintiff's case where the communication is privileged, and proof thereof may therefore be introduced under the general issue without resort to a special plea or notice.

PLAINTIFF IS NOT BOUND TO PROVE FALSITY OF LIBEL CHARGED if it is not privileged; and the justification of it as true is therefore not a denial of anything incumbent upon the plaintiff to prove, is strictly in avoidance, and must be pleaded or noticed specially.

GENERAL OBJECTION TO STATEMENT OF WITNESS AS TO HIS AUTHORITY AS AGENT, made after he has testified without objection to his acts as such agent, is properly overruled, as the court cannot know judicially that his action was not accepted and followed by his principal, and if so, it is immaterial whether he had or had not any original authority.

**IT IS FOR JURY TO DETERMINE WHETHER, IN ACTION OF LIBEL, EXCESSIVE-
MENT IS CHARGED** by a letter which, after accusing the plaintiff of vexatious acts, and with charging larger than the usual rates, contained the following language: "It is wondered at how he can live in more than ordinary style, as he does, while having merely the honorable receipts of his agency to live upon." And an instruction that if such was their inference from the language in the letter they would be warranted in drawing it, is not erroneous as tending to mislead them into supposing it to be an obligatory inference.

ACTION for libel. The opinion states the case.

A. Blair, for the plaintiff in error.

Johnson and Higby, for the defendants in error.

By Court, CAMPBELL, J. Chandler sued Edwards upon a charge of libel, in writing to Henry Kip, superintendent of the United States Express Company, a letter reflecting upon the character of Chandler as agent of that company, at the village of Hillsdale, and complaining of his conduct in such agency.

Edwards pleaded the general issue, and with it gave notice that the letter was of such a character, and written under such circumstances, as to make it a privileged communication. The notice also set forth several facts going to prove the truth of many of the allegations in the letter, but not purporting to cover all of them.

As the letter was clearly privileged, and was so held by the court below, the only questions to be considered are such as apply to that class of instruments.

Upon the trial, after the plaintiff below had closed his case, and after the defendant had introduced proof upon the specific facts detailed in the notice appended to his plea, the latter offered to prove additional facts not contained in the notice going to establish the truth of his letter. Objection being made, the court declined to permit this, and held that no evidence should be received on the subject except of facts alleged.

In this the court was very clearly in error. Where a communication is privileged, the plaintiff cannot recover without proving affirmatively not only the falsehood of its contents, but also that it was published with express malice. Unless he can prove both of these points, he must fail. The falsehood being a necessary part of the case to be made out by the plaintiff, the truth is but a contradiction of that case, and may be made out under the general issue, therefore, without resort to a special plea or notice. Upon this question there seems to be no conflict of authority, and it is in accordance with the general doctrine of pleading that the defendant may deny under the general issue whatever the plaintiff is obliged to prove as an essential part of his own case.

Where the libel charged is not privileged, then the plaintiff is not bound to prove its falsity; and the justification of it as true, not being a denial of anything which rests on the plaintiff, is strictly in avoidance, and must therefore be pleaded or noticed specially.

The same rule of pleading, therefore, which requires a special plea in the one case renders it inapplicable in the other; and so it has been determined: *Remington v. Congdon*, 2 Pick. 310 [13 Am. Dec. 431]; 2 Greenl. Ev., sec. 421; 2 Starkie on Slander, 103, 104; *Bradley v. Heath*, 12 Pick. 163 [22 Am. Dec. 418]; *Fairman v. Ives*, 5 Barn. & Ald. 642; *Child v. Affleck*, 9 Barn. & C. 403; *Somervill v. Hawkins*, 3 Eng. L. & Eq. 503; *Fountain v. Boodle*, 3 Q. B. 5.

It is also alleged as error that parol evidence was improperly introduced to show the authority of one Calvin Cone. Having already testified without objection that he had charge of the express company's agents and business in Michigan and Ohio, and that he issued a certain table of rates and the rules and regulations attached, he proceeded to say that he had authority to issue and promulgate the same; and this last statement was objected to.

The objection is a general one, and its validity is therefore

questionable under any circumstances, but we do not perceive that it has any special force. We cannot know judicially that his action was not accepted and followed by the company, and if so, it can make no odds whether he had or had not any original authority, nor whether it was verbal or written.

It is also alleged as error that the court improperly charged the jury that they would be warranted in inferring from the letter sued on a charge of embezzlement, or of misapplying or appropriating the funds of the express company or their customers to the use of Chandler. The language supposed to justify this inference was this: "It is wondered at how he can live in more than ordinary style, as he does, while having merely the honorable receipts of his agency to live upon." The letter had previously accused him of vexatious acts, and of charging larger rates than were charged at other offices.

The language does not necessarily imply that he had embezzled or stolen, but it is ambiguous, and we are not prepared to say that a jury could not draw such an inference without unreasonably stretching or perverting the sense. Such language must be construed by the jury, and not by the court: *Lewis v. Chapman*, 16 N. Y. 371. But the court in this case did not direct the jury to draw the inference. They were told that "if such was their inference from the language in the letter," they would be warranted in drawing it. This left it entirely to the jury, and we cannot say that it was done in such a way as to mislead them into supposing it to be an obligatory inference.

There being error in the exclusion of testimony, the judgment must be reversed, with costs, and a new trial granted.

The other justices concurred.

WHAT COMMUNICATIONS ARE PRIVILEGED: See *Aldrich v. Press Printing Co.*, 86 Am. Dec. 34, and note 33 et seq.; *Barrows v. Bell*, 66 Id. 479, and note 486.

ORDINARILY, TRUTH OF LIBEL CAN BE SHOWN ONLY UNDER PLEA OF JUSTIFICATION, and the general issue admits the innocence of the plaintiff with respect to the charge complained of: *Sheahan v. Collins*, 71 Am. Dec. 271. But see *Remington v. Congdon*, 13 Id. 431. So usually there is a presumption of malice, but if the communication is privileged, it is incumbent upon the plaintiff to prove it: *Lasson v. Hicks*, 81 Id. 49, and note 56; *Holt v. Parsons*, 76 Id. 49, note 53.

RESPECTIVE FUNCTIONS OF COURT AND JURY regarding the construction of the language of the alleged libel are shown in the note to *Van Felslen v.*

Hopkins, 4 Am. Dec. 351, 352; and see also *Barrows v. Bell*, 66 Id. 479, and note 486; *Tresca v. Maddox*, 66 Id. 198, and cases cited in the note 203; *Harrison v. Findley*, 85 Id. 456.

AGENT'S AUTHORITY CANNOT BE ESTABLISHED BY HIS OWN DECLARATIONS: *Harker v. Dement*, 52 Am. Dec. 670.

THE PRINCIPAL CASE IS CITED TO THE POINT THAT THE STATUTORY LIKE THE COMMON-LAW GENERAL ISSUE IS A DENIAL OF ALL THE MATERIAL ALLEGATIONS IN THE DECLARATION, AND IS SUFFICIENT TO ENABLE THE DEFENDANT TO CONTEST ALL SUCH ALLEGATIONS, AND TO PUT THE PLAINTIFF UPON THE PROOF OF ALL OR ANY OF THEM: *Rawson v. Finlay*, 27 Mich. 271.

SISSON v. CLEVELAND AND TOLEDO R. R. Co.

[14 MICHIGAN, 489.]

ACTION FOR BREACH OF CONTRACT MUST AT COMMON LAW BE BROUGHT IN NAME OF CONTRACTING PARTY, and not in the name of his assignee, for the assignment of a non-negotiable demand does not at common law entitle the assignee to pursue remedies in his own name upon the contract; though the court will take notice of the assignment for the purpose of protecting the interest of the assignee.

MICHIGAN STATUTE ALLOWING ASSIGNEE TO SUE IN HIS OWN NAME UPON CONTRACT is only permissive in its provisions, and the assignee is still at liberty to sue in the name of the contracting party.

DECLARATIONS OF CONDUCTOR AS TO CAPACITY OF ENGINE TO DRAW TRAIN are admissible as part of the *res gestæ* in an action against a carrier for delay, where they related to the delay complained of, and were made while the conductor was engaged in the business of the defendants, in respect to the contract in question, and had control of the train. The defendants would not be absolutely bound by such statements, but they are admissible evidence on the general principles of agency.

QUESTION WHETHER WITNESS COULD FORM OPINION FROM APPEARANCE as to the capacity of an engine to draw a train is properly overruled where the witness is not claimed or shown to be an expert.

MARKET REPORTS IN NEWSPAPERS, SUCH AS COMMERCIAL WORLD RELY UPON, are competent as evidence of state of markets. Such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries.

WHERE SEVERAL RAILROAD COMPANIES ARE SUED FOR DELAY ON JOINT CONTRACT of transportation, evidence introduced by them as to which of them should have furnished cars at a particular point of the transportation is immaterial, since they were jointly liable for a failure to fulfill the contract, and the plaintiff had no concern with any arrangement of the defendants among themselves.

CARRIER WHO AGREES TO TRANSPORT FROM TOLEDO TO BUFFALO goods which he knows to be destined for an Albany or New York market is liable for a loss caused by a fall in prices in the Albany market, where a delay occurred in the transportation between Toledo and Buffalo, and the loss occurred before the goods could be delivered at Albany, notwithstanding there was no fall in prices when the goods reached Buffalo;

for the loss must be regarded as the direct consequence of the defendants' delay.

LOSS BY DEPRECIATION OF MARKET IS PROXIMATE RESULT OF DELAY IN TRANSPORTATION, and may be recovered as damages against a carrier.

CARRIER IS NOT RELIEVED FROM LIABILITY FOR LOSS BY FALL OF MARKET, in case of delay of transportation of cattle, by provisions of the contract of transportation that the shipper assumes "all and every risk of injuries which the animals or either of them may receive in consequence of any of them being wild, unruly, vicious, weak, escaping, maiming, or killing themselves or each other, or from delays," etc., "and risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to or from or in the loading or unloading the stock"; for this stipulation refers to injuries to the cattle caused by delay, etc., and to loss or damage by reason of delay in loading or unloading, and has no reference to other losses which the delays of the carrier may cause to the shipper.

ASSUMPSIT against several railroad companies as common carriers upon a special written contract signed by the defendants jointly for the transportation from Toledo to Buffalo of a lot of beef cattle on their way to the market at either Albany or New York. The defendants, it was shown, owned severally different parts of the continuous line of railroad from Toledo to Buffalo. The evidence also showed that the plaintiffs shipped the cattle at Adrian, Michigan, for Albany or New York, but on the route, and before they arrived at Toledo, sold them to John L. Perkins, who was the owner of the cattle at the time of the execution of the contract in question, and continued to be the owner at the time of the commencement of the suit, and was therefore the real plaintiff in interest; but he brought the action in the name of the original parties to the contract. And this contract was made in the name of the original shippers, who sold to Perkins because of the custom practiced by the defendants, one of whom received the cattle upon its cars upon their arrival at Toledo; which custom was to ship freight received from other roads over their lines in the same name in which it was billed to them, and to make no change in the name of shipper or consignee, unless the original shipper or consignee were present to direct it. Just before starting from Toledo, however, an agent of the defendants presented a duplicate of the contract in suit to Perkins, and required him to sign the same, and he did so. Damages were sought by reason of delay in transportation, and evidence was introduced tending to show that through the fault of the defendants the cattle were detained a long time on the way from Toledo to Buffalo; and that the plaintiff was subjected to loss by reason thereof,

both from the depreciation in the quality of the cattle and from the fall in the market before they arrived at Albany. Verdict for the defendants, and judgment accordingly. Error assigned by the plaintiff. In other respects, the opinion states the case.

A. L. Millerd, for the plaintiffs in error.

C. A. Stacy, for the defendants in error.

By Court, COOLEY, J. The circuit judge erred in charging that the action could not be brought in the name of the plaintiffs, but should have been in that of John L. Perkins. The written contract was made with these plaintiffs, and a court of law can only look at the promisors and promisees as the parties in legal interest, and is not at liberty to govern its action by questions of equitable right: *Litchfield v. Garratt*, 10 Mich. 426; *United States v. Parmele*, 1 Paine, 252. The case is analogous to that where an agent enters into a written contract for his principal in his own name, and which the principal must enforce in the name of the nominal contracting party: *Newcomb v. Clark*, 1 Denio, 226. The assignment of the contract to the party in interest would not affect this rule. The court would take notice of the assignment for the purpose of protecting the interest of the assignee; but the assignment of a non-negotiable demand does not at the common law entitle the assignee to pursue remedies in his own name upon the contract. The statute which allows it (Laws of 1863, p. 102) is only permissive in its provisions, and the assignee is still at liberty to sue in the name of the contracting party.

We think the judge also erred in excluding evidence of the conductor's statements as to the capacity of the engine. The statements offered to be shown were made while the conductor was engaged in the business of the defendants, in respect to the contract in question, and had control of the train, and they related to the delay complained of, which was the *res gestæ* of the case: See *Baring v. Clark*, 19 Pick. 220; *Price v. Marsh*, 1 Car. & P. 60; *Peyton v. Governor of St. Thomas Hospital*, 3 Id. 363. The defendants would not be absolutely bound by such statements, but they are admissible evidence on general principles of agency: Dunlap's Paley on Agency, 272 et seq., and notes.

The question put to the witness Perkins, whether he could form an opinion from the appearance as to the capacity of the engine to draw the train, might have been proper for the pur-

pose of showing him to be an expert; but as it does not appear to have been put by the plaintiffs on this ground, we cannot say that it was improperly overruled. The fact sought to be proved was one to which none but an expert could from mere appearance testify; and it does not appear to have been claimed that Perkins was an expert.

We also think that the court erred in excluding evidence of the state of the markets as derived from the market reports in the newspapers. The precise question involved does not appear to have been passed upon by the court; but we are aware of no reason and no authority which would exclude the evidence. In *Lush v. Druse*, 4 Weud. 317, the value of wheat at a certain point was allowed to be proved by a witness who had derived his knowledge solely from the books of large dealers in wheat at that place; and in *Re Fennerstein's Champagne*, recently decided by the supreme court of the United States,—8 Wall. 145,—the market value of articles of merchandise at a particular place in a foreign country was held provable by letters written by third persons abroad in the ordinary course of business to other third persons, offering to sell at specified rates. The principle which supports these cases will allow the market reports of such newspapers as the commercial world rely upon to be given in evidence. As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries; and courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character.

We do not perceive the importance of the evidence introduced by the defendants as to which of the railroad companies should have furnished the cars to continue the transportation from Cleveland. The companies had jointly undertaken to transport the cattle to Buffalo; and they were jointly liable for a failure to fulfill the contract. The plaintiff had no concern with the arrangements of the defendants among themselves, and no right in any way to control them. It was not competent for them to make any rules, or to enter into any arrangements, or to enforce any previously made, which would modify the contract entered into with the plaintiffs; and proof that one of the defendants, instead of another, was the cause

of the injury complained of is wholly immaterial in a suit against all. If the plaintiffs could be held bound to know what the course of the companies was as to furnishing cars, they would still have the right to suppose that the company who was to furnish them would do so without unnecessary delay, inasmuch as all had entered into a joint contract which would require it.

The contract of the defendants was to transport the cattle from Toledo to Buffalo. Their ultimate destination was Albany or New York, but this fact was not stated in the contract, and the court charged the jury that the plaintiffs could not recover damages for loss by depreciation of cattle in the market except at Buffalo. If the judge meant the jury to understand by this charge that the damages which plaintiffs could recover must be confined to the fall in the market at Buffalo between the time when the cattle should have reached that point and that of their actual arrival, we think he erred. The defendants were informed when they entered into the contract that the ultimate destination was to an Albany or New York market; and they must be held to have assumed their obligations in reference to that fact. If, in fact, there was no fall in prices before the cattle had reached Buffalo, but afterwards, and before they could be delivered at Albany, a loss had occurred as the direct consequence of defendants' delay, it would be both illogical and unjust to hold that defendants shall be discharged because the injurious consequences of their act did not result until the cattle were out of their own hands. The consequences of delay would attend the cattle to their final destination just as the consequences of a fatal injury to one of them would attend the animal until his death; and in neither case could the party responsible excuse himself by showing that the actual loss or the death did not occur while the property was retained in his possession.

We are referred to several authorities which are supposed to hold that a fall in market value cannot be recovered by way of damages. The first of these is *Smith v. Griffith*, 3 Hill, 333 [38 Am. Dec. 639], where it was held that the damages recoverable against carriers for the negligent loss or injury of goods intrusted to them for transportation are to be ascertained by resorting to the price which goods of the same kind and quality bore in market at the time the injury occurred, and not to the price at a subsequent period. The decision has obviously no bearing upon the question before us, but is based upon the

principle that when a party is deprived of his property by the wrongful act of another, he should be compensated with such damages as would at the time enable him to procure a similar article of equal value in the market. The question in *Conger v. Hudson River R. R. Co.*, 6 Duer, 375, was whether the shipper could recover from the carrier damages occasioned by a loss of market through delay; and the court intimated that such damages are too speculative in their character to form the basis of legal action. The only case in point is that of *Wibert v. New York and Erie R. R. Co.*, 19 Barb. 36, where it was held, in an action against a carrier for failure to deliver butter in a reasonable time, that the difference between the value of butter at the time it should have been delivered and its value at the time of actual delivery could not be recovered as damages, because the loss was not the actual and proximate result of the act complained of. The reasoning of the court is, that the fall in price was not in consequence of the delay, and therefore the carrier was not liable for the resulting loss. It is to be regretted that this point was not passed upon by the court of appeals when the case reached that tribunal,—12 N. Y. 245,—as the case seems to us to lay down a rule of damages wholly unwarranted by reason or authority. To apply a similar principle to other cases, we should be required to hold that one who had unroofed the house of another, in consequence of which it became deluged with rain, would not be liable for the damages, because unroofing the building did not cause the rain. There is a great deal of refining in the case as to what are natural and proximate causes of damage; but refinement of reasoning that goes to the extent of shocking the common understanding cannot possibly establish good law. All legal damages result from the action of the party in fault, in connection with existing circumstances; and to exclude proof of those circumstances because they were not caused by the wrongful act would deprive the injured party in many cases of all remedy. If a loss by depreciation in the market is not a necessary and proximate result of delay in transportation, it is difficult to conceive of any rule by which a carrier can be made to compensate the party injured.

The defendants claim in this court that the action cannot be sustained in any event, because by the express terms of the contract they are not to be liable for delays. We do not so read the contract. It provides that Sisson and Perkins "does hereby agree to take, and hereby does assume, all and every

risk of injuries which the animals or either of them may receive in consequence of any of them being wild, unruly, vicious, weak, escaping, maiming, or killing themselves or each other, or from delays," etc., "and risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to or from or in the loading or unloading the stock." As we read this agreement, it refers to loss or damage to the party by reason of injuries to the stock caused by delay, etc., upon the cars, and to loss or damage by reason of delay in loading or unloading, and has no reference to other losses which the delays of the carriers may cause to the shipper. There are good reasons for an agreement of this description, growing out of the manner in which cattle are usually transported, the owner or his agent accompanying and taking charge of them, and being on hand to prevent injuries of the kind specified, while no care of the owner could prevent other delays, or protect against losses which might follow incidentally from other delays. The stipulation appears to us carefully worded to cover such injuries and losses as the owner might guard against, while it studiously avoids including losses like the one complained of here.

The judgment must be reversed, with costs, and a new trial ordered.

The other justices concurred.

NEWSPAPER REPORTS AS EVIDENCE. — The documentary-evidence act of England provides that the government or official gazette shall be "*prima facie* evidence of any proclamation, order, or regulation" of the government, or of any of its departments: 1 Whart. on Ev., sec. 671. At common law, also, the London Gazette, which is printed under the authority of the government, is evidence of the royal proclamations, and of the acts of the crown and of state, such as the presentation to the sovereign of addresses from different bodies of subjects expressing their loyalty, etc., which fact was announced to the public in the gazette: *Rex v. Holt*, 5 Term Rep. 443; see *Gen. Picton's Case*, 3 How. St. Tr. 493; 1 Greenl. Ev. 492; *Attorney-General v. Theakstone*, 8 Price, 89; and this rule rests principally upon the ground of the impossibility or impracticability of adducing other evidence of such acts. They must, however, be matters of exclusively public interest and importance, the rule not extending to matters of private interest, though emanating from the crown or government and published in the gazette; therefore the gazette is not at common law evidence of the grant of land to a subject: *Rex v. Holt*, *supra*; nor of the military appointments therein published: *Rex v. Gardner*, 2 Camp. 513. And even to prove the king's proclamations the gazette must be produced, as a judge *at nisi prius* will not take judicial notice of them without such proof: *Van Omeron v. Dowick*, 2 Id. 44. A distinction similar to that above has been taken in this country in *Brundred v. Del Hoyo*, 20 N. J. L.

328, where it was held that though a government gazette of Mexico may be admitted as evidence of the public acts of that government or of matters of state, it is no evidence of private titles or private interests, or to prove a fact of a private nature, as the residence of a person. But volumes of public documents published by the authority of the United States are admissible as evidence of their contents: *Whiton v. Albany City Ins. Co.*, 109 Mass. 24. And the common-law rule as contained in the English cases may be regarded as adopted in this country upon the authority of *Lurton v. Gilliam*, 1 Scam. 577, where it was held that the state register, being made by law the public paper in which the official acts of the governor required to be made public are published, is correctly admitted in evidence to prove the existence of facts stated in the governor's proclamation.

The rule, as broadly laid down in the principal case, that market reports and prices current published in newspapers may be used to prove the state of the market and the price of a particular commodity at the date of the publication of the newspaper, is supported by *Comstock v. Smith*, 20 Mich. 342, and *Terry v. McNiel*, 58 Barb. 241, 247; and see *Henkle v. Smith*, 21 Ill. 238; *Chaffee v. United States*, 18 Wall. 541. A restriction is, however, maintained by the case of *Whelan v. Lynch*, 60 N. Y. 474, wherein it was held that some evidence must be introduced in respect to the sources of information consulted by the editors in compiling their reports, in order that the court may have regard to their authenticity. In that case, Miller, J., delivering the opinion of the court, said: "Independent of the charge, the court was also in error, I think, in admitting the Shipping and Price Current List as evidence of the value of the wool, without some proof showing how or in what manner it was made up; where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales, or otherwise. It is not plain how a newspaper containing the price current of merchandise, of itself, and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depend entirely upon the sources from which the information is derived. Mere quotations from other newspapers, or information obtained from those who have not the means of procuring it, would be entitled to but little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself without some proof of knowledge of the mode in which the list was made out. As there was no such testimony, the evidence was entirely incompetent, and should not have been received. The authorities cited to sustain the ruling of the judge in regard to the admission of this evidence do not include any such case. In *Lush v. Druse*, 4 Wend. 314, the witness who testified as to the market price had inquired of merchants dealing in the article, and examined their books, thus giving the source of his knowledge. In *Terry v. McNiel*, 58 Barb. 241, it does not appear in what form the question was presented, or whether any preliminary evidence had been introduced to show the accuracy of the newspaper quotations. In *Cléquot's Champagne*, 3 Wall. 117, it appeared that the price current was procured directly from dealers in the article, and was verified by testimony which tended to show its accuracy. The objections made to the evidence were sufficient, and its admissibility cannot be upheld within these cases-cited." In the Albany Law Journal for 1876, p. 317, it is stated that the remarks in the above opinion in respect to the facts in *Terry v. McNiel*, 58 Barb. 241, are incorrect, and that in the latter case there was no preliminary evidence showing the accuracy of the newspaper quotations; and it

is also said that *Terry v. McNiel*, *supra*, was "unanimously affirmed on the opinion of Judge Platt Potter, as found in 58 Barb. 241. It will be perceived, therefore, that if the court of appeals are right in their decision in 60 New York, they were wrong in their disposition of 58 Barb. 241."

Upon this question the case of *Cliquot's Champagne*, 3 Wall. 114, cited in *Whelan v. Lynch*, *supra*, is instructive, notwithstanding the price-current list involved in that case was not a newspaper publication. A seizure of champagne had been made for an alleged violation of the revenue laws, and upon the trial of the case it became necessary to prove the prices of champagne in France. For this purpose prices current obtained from the agent of the manufacturer and from dealers in the manufactured articles, which had been prepared and used by the parties furnishing them in the ordinary course of their business, were offered in evidence, and were objected to on the ground, among others, that they were hearsay, that no actual transaction was based upon them, that the price lists were not connected with the manufacturer of the wine in question, and that the wines enumerated did not appear to be the same in quality with those libeled. Upon this point, Mr. Justice Swayne, delivering the opinion of the supreme court of the United States, cited approvingly *Lusk v. Druse*, 4 Wend. 315, where it was held that a witness might testify to the value of wheat at certain periods in Albany where his knowledge was derived from inquiries of large dealers in wheat at that place, and from an examination of their books, and said: "While courts in the administration of the law of evidence should be careful not to open the door to falsehood, they should be equally careful not to shut out truth. They should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy, — itself a serious evil, — without giving any additional safeguard to the interests of justice. We think the price current is not liable to the objection that it was hearsay. It was prepared and used by the party who furnished it in the ordinary course of his business. It is as little liable to that objection as the entries in the books of the dealer, or his answers to the inquiries of a witness, both of which were admissible upon the authority of the case referred to in *Wendell*. It was clearly relevant. What effect it should have, in connection with the other evidence adduced by the parties, was a question for the jury." See also the citation and explanation of this case and of *Fensterstein's Champagne* in *Chaffes v. United States*, 18 Wall. 541, in which Mr. Justice Field said: "Market value is a matter of opinion, which may require for its formation the consideration of a great variety of facts. To arrive at a just conclusion, prices current, sales, shipments, letters from dealers and manufacturers, may properly receive consideration." The published price current was properly admitted as evidence against the defendant, to prove the market value of grain, in *Heakle v. Smith*, 21 Ill. 238, for it was proved that he was in the habit of revising and correcting the list before its publication in the newspaper offered in evidence.

Witnesses whose information is derived wholly or partly from published market reports such as merchants usually rely upon, or from correspondence, are competent to testify as to the market value of commodities even in another city: *Whitney v. Thatcher*, 117 Mass. 523, 527; *Sirrine v. Briggs*, 31 Mich. 446; *Laurent v. Vaughan*, 30 Vt. 90; but see *Harris v. Ely*, Seld. Notes, 37. The principal case, it was said in *Cleveland etc. R. R. Co. v. Perkins*, 17 Mich. 296, 301, "does not require that the newspapers themselves should be put in evidence, but it recognizes them as a proper source of information to which persons interested in the markets may resort; and there is no reason

why they should not testify the result of their examinations, as they might the result of inquiries in the market-places."

As to other matters, no more liberal rule than that prevailing in the case of books and other publications can obtain in regard to newspapers: 2 Morgan on Literature, 510. As a general rule, books are not admissible as evidence of the facts stated in them, especially when the facts sought to be proved are such that other evidence is procurable, for the reasons that the statements in books are not made under oath, and no opportunity for cross-examination of the author is furnished: See note to *Ashworth v. Kittridge*, 59 Am. Dec. 180 et seq.; *Morris v. Harmer*, 7 Pet. 554; *Payson v. Everett*, 12 Minn. 216. And these reasons seem to apply with equal force to the statements of newspaper reporters. In fact, it is hardly necessary to state that newspapers will not be received as evidence of matters ordinarily contained in them. Advertisements, however, have been admitted to prove the usual time of the arrival of a stage-coach: *Commonwealth v. Robinson*, 1 Gray, 555; the fact of the offer of a reward: *Lee v. Flemingsburg*, 7 Dana, 23; and that a certain house was at a given date a hotel: *Stringer v. Davis*, 35 Cal. 25, — when properly brought home to the party to be affected by the evidence: See *Ring v. Huntington*, 1 Mill Const. 162; *Sweiger v. Lowmaster*, 14 Serg. & R. 200. So a notice of marriage, or of a separation of man and wife, is admissible under proper circumstances: *Redgrave v. Redgrave*, 38 Md. 100, 101; *Jewell v. Jewell*, 1 How. 219, 232. But a notice in a newspaper published in New York of the death of a person in Texas is no evidence of his death: *Fosgate v. Herkimer Mfg. Co.*, 9 Barb. 287, 295.

LIABILITY OF NEWSPAPERS FOR LIBEL: Note to *Aldrich v. Press Printing Co.*, 86 Am. Dec. 89 et seq.

LIABILITY OF PERSONS RECEIVING NEWSPAPERS FROM POST-OFFICE: Note to *Fogg v. Portsmouth Athenæum*, 82 Am. Dec. 194.

MEDICAL AND SCIENTIFIC WORKS AS EVIDENCE AND AUTHORITY IN COURTS OF LAW: Note to *Ashworth v. Kittridge*, 59 Am. Dec. 180-187.

DECLARATIONS OF AGENT, MADE IN EXECUTION OF HIS AGENCY, are admissible as part of the *res gesta*: *Converse v. Blumrich*, ante, p. 230, and note. The principal case is cited to the point that in an action against a railroad company for damages caused by delay in the carriage of cattle, the statements of the conductor relating to the delay, and made while he had control of the train in which the cattle were carried, were held to be part of the *res gesta*: *O'Connor v. Chicago etc. R'y Co.*, 27 Minn. 171.

ASSIGNEE MAY SUE IN HIS OWN NAME where the statutes permit it: *Petersen v. Chemical Bank*, 88 Am. Dec. 298; *Hooker v. Eagle Bank of Rochester*, 86 Id. 351. And the assignee of a debt may bring an action on it in the assignor's name at common law: *Farmers' etc. Bank v. Humphries*, 86 Id. 671.

OPINIONS OF WITNESSES NOT EXPERTS, WHEN ADMISSIBLE: See *Whittier v. Town of Franklin*, 88 Am. Dec. 185, and note. In *Detroit etc. R. R. Co. v. Van Steinburg*, 17 Mich. 99, it is held, distinguishing the principal case, that testimony concerning the speed of a passing train of cars may be given by any one possessing a knowledge of time and distance, as this relates to a matter of common observation.

CONNECTING LINES OF CARRIERS: See this subject treated at length in the note to *Wells v. Thomas*, 72 Am. Dec. 230. Upon a joint contract, connecting carriers are jointly liable: *Bradford v. South Carolina R. R. Co.*, 62 Id. 411, note 418.

MEASURE OF DAMAGES FOR DELAY IN TRANSPORTATION OF GOODS may be the difference between the market value of the goods at the time of delivery and at the time they should have been delivered: *Galena etc. R. R. Co. v. Roe*, 68 Am. Dec. 574; *Nettles v. South Carolina R. R. Co.*, 62 Id. 409, and note 411; *Cutting v. Grand Trunk R'y Co.*, 13 Allen, 381, 389, citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED to the point that where a party on default of his contractor purchases the articles which the latter should have furnished, and gets them on as good terms as he can, he is entitled to reimbursement on those terms: *Platt v. Brand*, 26 Mich. 176; and to the point that a court will judicially notice the methods and degree of care used by railroad companies in the transportation of cattle: *Michigan etc. R. R. Co. v. McDough*, 21 Id. 194. It is also cited to the point that a record of the weather kept for a number of years at the state insane asylum is competent evidence to prove the temperature of the weather on a given day included in such record: *De Armond v. Neasmith*, 32 Id. 233.

RIPLEY v. DAVIS.

[15 MICHIGAN, 75.]

APPLICATION OF DEFENDANT FOR LEAVE TO INTERPOSE DEFENSE OF STATUTE OF LIMITATIONS after having pleaded the general issue is addressed to the discretion of the court below, and its denial cannot be reviewed by the appellate court.

TROVER WILL LIE BY ONE CO-TENANT AGAINST ANOTHER where the latter, being bound by contract to deliver and divide the joint property at a certain place, appropriates it to his exclusive use under a claim of exclusive right, and under circumstances which render a division and delivery in the manner agreed practically impossible.

MEASURE OF DAMAGES IN TROVER IS VALUE OF PROPERTY AT TIME OF CONVERSION, with interest from that time, unless there are special circumstances which require a different measure of damages to be applied.

TROVER for the value of two fifths of a quantity of logs cut by the defendants upon the premises of the plaintiff, under an agreement by which the logs were to be boomed at Port Huron, and divided there. The defendants did not comply with their agreement, but ran the logs past Port Huron to Trenton, a point much farther down the stream, where their mill was situated, and from which place it was practically impossible to run the logs back to Port Huron, and they also claimed the ownership of all the logs under an alleged purchase from the plaintiff. Upon the trial, the defendants' counsel objected to a portion of the evidence introduced by the plaintiff, on the ground that it tended to show that the alleged conversion, or a part of it, occurred more than six years before the institution of the suit, the declaration having alleged the conversion

to have taken place within six years. The court, however, overruled the objection, and also refused to allow the defendants to add to their plea a notice of the statute of limitations. Judgment was for the plaintiff.

William T. Mitchell and A. B. Maynard, for the plaintiff.

B. C. Farrand, E. Hall, and C. A. Kent, for the defendants.

By Court, COOLEY, J. We are not satisfied, from the evidence in this case, that there was an agreement between the parties under which the logs in controversy were to be charged to the plaintiff in account. The weight of evidence is the other way. We will therefore proceed to dispose of the legal questions raised.

1. The application of the defendants for leave to interpose the defense of the statute of limitations after having pleaded the general issue was one addressed to the discretion of the court below, and its denial cannot be reviewed by this court. While liberality should be exercised by the circuit courts in granting amendments, for the furtherance of justice, yet as each application must depend upon its own circumstances, and can best be disposed of by the court which has had the case before it from the commencement, the practice has wisely vested such court with a power of final disposition with which we have no inclination to interfere.

2. The proof of conversion by the defendants was ample, and we have no doubt of the right of the plaintiff to maintain the action on well-settled principles. The logs were to be boomed at Port Huron, and divided there. Instead of complying with their contract in this particular, the defendants took the logs to Trenton, from whence their return to Port Huron for the purpose of delivery to the plaintiff was impracticable. Moreover, they set up a claim to them as their own exclusively under a contract of purchase, and assumed to give the plaintiff credit for them on their books. The case, therefore, is not simply one where a tenant in common has excluded the co-tenant from a joint possession, but it is the case of a co-tenant bound by contract to divide the joint property at a certain place, appropriating it altogether to his own exclusive use under a claim of exclusive right, and under circumstances which render a division and delivery in the manner agreed upon practically impossible. The case is within the principle of *Fiquet v. Allison*, 12 Mich. 328, and *Webb v. Mann*, 3 Id. 139, and we have no disposition to narrow or limit those decis-

ions in any way. The greater difficulty, which was suggested on the argument, of dividing logs by the quantity over that of dividing wheat is one of degree only, and cannot affect the principle.

3. There is nothing upon this record to show precisely what rule of damages was adopted by the circuit judge, and while we do not feel called upon in this case to say that there is any inflexible rule applicable to all cases of wrongful conversion, we think that where there are no special circumstances which require a different measure of damages to be applied, it is proper to award to the plaintiff the value of the property at the time of conversion, with interest from that time; in other words, to award to him a sum of money which at the time he is wrongfully deprived of his property would enable him to procure an equal amount of the same value: *Kennedy v. Whitwell*, 4 Pick. 466; *Sargent v. Franklin Ins. Co.*, 8 Id. 90 [19 Am. Dec. 316]; *Pierce v. Benjamin*, 14 Id. 356 [25 Am. Dec. 306]; *Greenfield Bank v. Leavitt*, 17 Id. 1 [28 Am. Dec. 268]; *Johnson v. Sumner*, 1 Met. 172; *Barry v. Bennett*, 7 Id. 354; *Fowler v. Gilman*, 13 Id. 267; *Watt v. Potter*, 2 Mason, 76; *Banks v. Hatton*, 1 Nott & McC. 221; *Lillard v. Whitaker*, 3 Bibb, 92; *Sproule v. Ford*, 3 Litt. 25; *Outton v. Barnes*, Litt. Sel. Cas. 137.

We have applied this rule to the evidence in the case, and testing by it the result arrived at by the circuit judge, we are inclined to think his conclusion as near correct as any to be deduced from this record. The defendants had credited the plaintiff with 475,054 feet of logs, got out under the contract in 1855-56. Leighton's testimony shows 261,000 feet got out in 1857-58, of which only 26,463 were credited. While this last amount would be subject to a deduction for loss in running them down, we may fairly offset to this a probability of the evidence, all of which comes from the defendants or their witnesses not showing the full amount. At any rate, where defendants fail to give account of the quantity obtained, and the plaintiff is obliged to rely upon uncertain oral evidence, it is not proper that legal intendments should be stretched to favor the party in default. We assume, therefore, that the whole amount obtained from the land was 436,054 feet, which is very far below the estimates of those who judged by the standing timber or the stumps, but probably much nearer correct. Plaintiff would be entitled to two fifths of this amount, or 174,422 feet. The logs should

have been divided during the season of 1858, when their value was about \$7.75 per thousand feet. Taking the 1st of January, 1859, as the time of conversion, and the calculation is as follows:—

174,422 feet, at \$7.75	\$1,351 77
Interest to November 18, 1865 (date of judgment)	647 16

The total is \$1,998 93

Or \$1.07 less than the estimate of the circuit judge. If we fixed upon either an earlier or a later period as the time of conversion, this sum would be slightly increased; as if fixed earlier, there must be a computation of interest for a longer period, and later the price of logs advanced.

The judgment must be affirmed, with costs.

MARTIN, C. J. After a careful examination of this case, we find no error in the judgment of the circuit judge. If any exists, it is rather to the favor of the defendants than adverse. The case is one resting almost entirely upon facts, and a review of them would be of no value. It is sufficient to say that we are satisfied with the judgment, and not inclined to disturb it.

The evidence of conversion is ample. The fact of the logs being run by the defendants from Port Huron to Trenton for their own purposes, and without the knowledge or consent of the plaintiff, sufficiently settles this question. By so doing, the property was placed beyond the reach of the plaintiff. They had disabled themselves to perform their contract, and thus deprived Ripley of his proportion of the logs. The fact of removing them from the boom at Port Huron, and running them to defendants' mill at Trenton, is conclusive of this. There could be no other intention than of conversion: See *Webb v. Mann*, 3 Mich. 139; *Weld v. Oliver*, 21 Pick. 559; *Lowe v. Miller*, 3 Gratt. 205 [46 Am. Dec. 188]; *Agnew v. Johnson*, 17 Pa. St. 373 [55 Am. Dec. 565]; and *Fiquet v. Allison*, 12 Mich. 328 [86 Am. Dec. 54].

The question as to the application to amend the notice so as to substantially plead the statute of limitations was one clearly within the discretion of the court below; and over such we have no power.

For myself, protesting, as I have often heretofore, against the jurisdiction of this court over questions of this kind, I concur

with my brethren that there is no error in the judgment of the court below, and that it must be affirmed, with costs.

The other justices concurred in the foregoing opinions.

DOCTRINE THAT THERE CAN BE NO CONVERSION BETWEEN CO-TENANTS applies to things which are in their nature so far indivisible that the share of one cannot be distinguished from that of another, and not to such articles as grain or money, which are susceptible of convenient division: *Fiquet v. Allison*, 86 Am. Dec. 54, and note 56, citing prior cases upon the maintenance of trover by one co-tenant against another.

MEASURE OF DAMAGES IN TROVER: See *Moody v. Whitney*, 61 Am. Dec. 239, and note 242; *Forsyth v. Wells*, 80 Id. 617. Interest from time of conversion, allowance of: See *Rippey v. Miller*, 62 Id. 177; *Clark v. Whitaker*, 48 Id. 160; *Lee v. Mathews*, 44 Id. 498; *Pridgin v. Strickland*, 58 Id. 124; *Thrall v. Lathrop*, 73 Id. 306, note 309. The principal case is cited to the point that ordinarily in trover the proper measure of damages is the value of the property at the time of the conversion, with interest thereon from that date: *Burt v. Webb*, 32 Mich. 179; *Rhems v. Clinton*, 2 Utah, 238.

THE PRINCIPAL CASE IS CITED to the point that the allowance of an amendment to the notice attached to a plea is within the discretion of the trial court, and not subject to review on error except where it is made to appear that there has been an abuse of discretion: *Browns v. Moore*, 32 Mich. 256; *Polkman v. Ann Arbor Savings Bank*, 27 Id. 51.

JACKSON v. CLEVELAND.

[15 MICHIGAN, 94.]

WHERE DEED HAS BEEN RECORDED, AND GRANTEE HAS CONVEYED LAND as owner under the deed with the concurrence of the grantor, this amounts to a delivery, though the deed was made without the knowledge of the grantee, and was never actually delivered to him.

ABSENCE OF CONSIDERATION IN FACT IS NOT SUFFICIENT WITHOUT FRAUD OR MISTAKE to raise a resulting trust in favor of a grantor who has conveyed by fee-simple deed reciting a valuable consideration. So held where a husband and wife, being about to separate, conveyed by such deed to a third person land of the husband in order to avoid questions of dower.

VOLUNTARY DEED PURPORTING TO BE FOR BENEFICIAL USE OF GRANTEE, and made deliberately and without mistake or contrivance, is binding upon the grantor and his heirs, and can be avoided only by creditors and others having superior equities to the grantee.

COMMON-LAW RULE THAT FEOFFMENT WITHOUT CONSIDERATION, and which declared no uses, created a resulting use to the grantor was merely technical, and not applicable, where a consideration, though nominal, was recited, or beneficial uses in favor of the grantee expressed.

BILL in equity. The opinion states the case.

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the property might be deeded to some third person, and Cleveland was fixed upon, and the deed executed without consulting him. Two witnesses are sworn upon this transaction, and it does not appear from their testimony that there was anything said at the time or subsequently about what was expected to be the nature of Cleveland's holding. There is no reason to believe that there was any agreement on the subject, and Jackson evidently relied upon Cleveland to do what was to be done, if anything, without making specific terms with him. There is no admission of Cleveland that any one had rights which could be enforced against him, but he has offered to convey the property upon the terms of making provision for an illegitimate child of Jackson's, which the heirs refused to accept.

The case stands upon the simple question whether such a deed, because made without any consideration in fact, involves a resulting trust in favor of the grantor. This deed contains a recital of consideration, and declares the uses in the ordinary form in favor of the grantee, his heirs and assigns, in fee. It is in the form which would have been used had the land been bought and paid for, and it is designed upon its face to represent the grantee as an ordinary purchaser. The object, in fact, was to vest in him an indefeasible legal estate, whatever may have been the equities. And the intention to do this was not left subject to revocation, as the recording of the deed was made with an express purpose of having Cleveland enabled to convey, as he did convey, to the first person who became a purchaser of a portion of the estate. The equity, therefore, which is relied on in this cause depends upon the establishment of a principle that a voluntary deed, where no consideration in fact passes to the grantor, is subject to a trust in his favor, and no beneficial title vests in the grantee.

This claim is not sustained by any authority. A voluntary deed, which purports to be for the beneficial use of the grantee, and which was made deliberately and without mistake or contrivance, does not differ from any other deed in binding the grantor, and can only be attacked by those having superior equities which the grantor had no right to cut off,—as creditors, and the like. The only case approaching it is that where an equity is raised against a grantee in favor of the person who paid the purchase-money. This trust is now abolished by our statutes where the person paying the money has consented to the deed being thus made. And it could

always be rebutted by showing that the land was intended to vest beneficially: *Phillips v. Crammond*, 2 Wash. C. C. 441, 445, 446; *Benbow v. Townsend*, 1 Mylne & K. 506; *Maddison v. Andrew*, 1 Ves. Sr. 58. And in *Delane v. Delane*, 4 Brown Parl. C. 258, it was held that a person paying purchase-money, and allowing the deed to be made to another, precluded himself from setting up any such trust by holding such person out as the real owner, and witnessing a lease made by him as such. Upon this principle, the action of Jacob Jackson, in procuring Cleveland to deed the parcel sold, would have rebutted such a trust, had this been the case of a purchase by one person in the name of another, and had the statute left such trusts to be enforced. The presumed intention to claim the title is rebutted by acquiescence in the assertion of ownership.

This doctrine of resulting trusts has never been applied to mere voluntary conveyances. Mere want of consideration has never raised resulting trusts out of these: *Young v. Peachy*, 2 Atk. 256; *Lloyd v. Spillet*, 2 Id. 148; *Leman v. Whitley*, 4 Russ. 423; *Sturtevant v. Sturtevant*, 20 N. Y. 39 [75 Am. Dec. 371].

There is a class of cases, which were referred to upon the argument, which depend upon the common-law rule that a feoffment without consideration, and which declared no uses, created a resulting use to the grantor,—or in other words, was practically no conveyance. But this doctrine has been held to be merely technical at law and in equity, and not at all dependent upon any question of consideration. It rests upon the principles underlying the second great class of resulting trusts, where a trust results in the residue of all estates after the uses or trusts upon which they are conveyed are exhausted. And accordingly, either the mention of a consideration, although nominal, or the declaration of uses, will prevent any trust resulting, and confirm the title in the feoffee: *Lloyd v. Spillet*, 2 Atk. 148; *Sanders on Uses and Trusts*, 334, 335; 2 Fonb. Eq. 133; 1 Spence's Eq. 449-451, and cases cited. A court of chancery has never ventured against the expressed will of the donor, appearing on the face of the deed, to "take the use from the donee and give it back to the donor; in other words, uses annexed to a perfect gift, however gratuitous, were enforced": 1 Spence's Eq. 450.

We have found no authority which would justify us in raising a trust in the present case. Jackson saw fit to leave

Cleveland untrammelled by any obligation. Whether he has abused confidence, as there is great reason to believe, or whether he was, as he claims, made a beneficiary to cut off others, is not material.

The other questions need not, therefore, be discussed. The bill was properly dismissed, and the decree should be affirmed, with costs.

MARTIN and CHRISTIANCY, JJ., concurred.

COOLEY, J., did not sit in this case.

WHETHER TRUST IN FAVOR OF GRANTOR IN DEED MAY BE SHOWN BY PAROL EVIDENCE WHICH CONTRADICTS RECITAL OF PAYMENT IN CONSIDERATION CLAUSE. — It is universally established that the usual clause in a deed acknowledging the receipt of the consideration cannot be disproved or contradicted for the purpose of destroying the effect and operation of the deed. The grantor is by such clause estopped to deny that a consideration was paid, and thereby to show that the grantee was intended to be merely a trustee for him. And no parol evidence can be admitted for that purpose. But the vast preponderance of authority supports the rule that for all other purposes parol evidence may be received to explain, vary, or even to contradict, the consideration clause in a deed of conveyance: *Hill on Trustees*, 4th Am. ed., 170; 4 Kent's Com. 465; 3 Washburn on Real Property, 4th ed., 377; 2 Devlin on Deeds, sec. 834; *Coles v. Souleby*, 21 Cal. 47; *Peck v. Vandenberg*, 30 Id. 11; *Hendrick v. Crowley*, 31 Id. 471; *Rhine v. Ellen*, 36 Id. 362; *Belden v. Seymour*, 8 Conn. 304; S. C., 21 Am. Dec. 661; *Meeker v. Meeker*, 16 Id. 383; *Roe v. Jerome*, 18 Id. 138; *Worrall v. Waterson*, 7 Kan. 199; *Philbrook v. Delano*, 29 Ma. 410; *Goodspeed v. Fuller*, 46 Id. 141; *Wilkinson v. Scott*, 17 Mass. 249; *Twomey v. Crowley*, 137 Id. 184; *Henderson v. Henderson's Ex'rs*, 13 Mo. 161; *Hollocher v. Hollöcher*, 62 Id. 267; *McConnell v. Brayner*, 63 Id. 461; *Anll S. B. v. Anll's Adm'r*, 80 Id. 199; *McOrea v. Parmort*, 16 Wend. 460; S. C., 30 Am. Dec. 103; *Merriam v. Harsen*, 2 Barb. Ch. 232; *Squire v. Harder*, 1 Paige, 494; *Bank of United States v. Housman*, 6 Id. 526; *Barnum v. Childs*, 1 Sand. 58; *Allison v. Kurtz*, 2 Watts, 185.

Said Cowen, J., delivering the opinion of the court in *McOrea v. Parmort*, *supra*: "Looking at the strong and overwhelming balance of authority as collectible from the decisions of the American courts, the clause in question, even as between the immediate parties, comes down to the rank of *prima facie* evidence, except for the purpose of giving effect to the operative words of the conveyance. To that end, and that alone, is it conclusive."

And Field, J., delivering the opinion of the court in *Coles v. Souleby*, 21 Cal. 51, said: "The consideration clause of a deed is not conclusive. It estops the grantor from alleging that he executed the deed without consideration. It cannot be contradicted so as to defeat the operation of a conveyance according to the purposes therein designated, unless it be on the ground of fraud; but with this exception it is open to explanation, and may be varied by parol proof."

Daggett, J., delivering the opinion of the court in *Belden v. Seymour*, 8 Conn. 312, S. C., 21 Am. Dec. 661, said: "The principle is everywhere undoubted that such a clause in a deed has the effect to prevent a resulting trust

in the grantor. He is forever estopped to deny the deed for the uses therein mentioned; and this is its only operation."

And Napton, J., in delivering the opinion of the court in *Henderson v. Henderson's Ex'rs*, 13 Mo. 152, said: "But where the operation of the deed in respect to the interest or estate purporting to be conveyed is sought to be affected, such testimony is inadmissible. If the object of the testimony be to alter the effect of the deed in any other particular except the mere receipt, it cannot be admitted."

And the reasons for the rule are thus stated by Sawyer, J., delivering the opinion of the court in *Peck v. Vandenberg*, 30 Cal. 25: "It was not necessary in a deed of bargain and sale at common law to express a consideration; but it was necessary that there should in fact be a consideration, and that the consideration should be a valuable as contradistinguished from a good one. Without a valuable consideration, the deed of bargain and sale would not raise a use; and if there were none in fact, and none expressed in the deed, and no use was declared, there was at common law a resulting trust in favor of the grantor, and the operation of the deed would be defeated. If, then, the grantor of a deed of bargain and sale, which expressed a money consideration, should be permitted to prove by parol testimony that no money was in fact paid, he would be permitted to show in opposition to the deed itself that he had made no conveyance of a beneficial interest at all, and thereby prevent any beneficial estate from passing from him by the deed. This the policy of the law would not permit him to do, and he was held estopped by his deed from showing the fact for the purpose of preventing his deed from operating to pass an estate."

In the absence of fraud, accident, or mistake, however, the grantor in an absolute conveyance reciting a valuable consideration and acknowledging its receipt is precluded from showing by parol evidence that the grantee was to hold the property thereby conveyed as trustee for the grantor: *Hill on Trustees*, 4th Am. ed., 178; *Leman v. Whitley*, 4 Russ. 423; *Russ v. Mobius*, 16 Cal. 350; *Morrall v. Waterson*, 7 Kan. 199; *Philbrook v. Delano*, 29 Me. 410; *Clark v. Deshon*, 12 Cush. 589; *Trafton v. Hawes*, 102 Mass. 533, 541; *Beers v. Beers*, 22 Mich. 42; *Morse v. Shattuck*, 4 N. H. 229; S. C., 17 Am. Dec. 419; *Graves v. Graves*, 29 Id. 129; *Farrington v. Barr*, 36 Id. 86; *Moran v. Hays*, 1 Johns. Ch. 339; *Grout v. Townsend*, 2 Hill, 554; S. C. in court of errors, 2 Denio, 336; *Rathbun v. Rathbun*, 6 Barb. 98; *Stackpole v. Robbins*, 47 Id. 212; *Bolton v. Jacks*, 6 Robt. 166; *Beach v. Cook*, 28 N. Y. 508; *Squire v. Harder*, 1 Paige, 494; *Wilkinson v. Wilkinson*, 2 Dev. Eq. 376.

WHERE CONVEYANCE WAS VOLUNTARY, it was at one time thought that a trust in favor of the grantor might be shown, but it has been long since firmly established that no trust results to a grantor, even though he conveys his estate without a consideration: *Hill on Trustees*, 4th Am. ed., 170; *Perry on Trusts*, sec. 162; 2 *Devlin on Deeds*, sec. 1189; *Hutchins v. Lee*, 1 Atk. 447; *Lloyd v. Spillet*, 2 Id. 150; *Young v. Peachy*, 2 Id. 257; *Cook v. Fountain*, 3 Swanst. 590; *Parnell v. Hingston*, 3 Smale & G. 337; *Clavering v. Clavering*, 2 Vern. 473; *Jeffreys v. Jeffreys*, 1 Craig & P. 138; *Leman v. Whitley*, 4 Russ. 423; *Randall v. Ghent*, 19 Ind. 271; *Philbrook v. Delano*, 29 Me. 410; *Goff v. Rohrer*, 35 Md. 327; *Titcomb v. Morrill*, 10 Allen, 15; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Bank of United States v. Housman*, 6 Paige, 526; *Miller v. Wilson*, 15 Ohio, 108. *Hill*, in his work on trustees (4th Am. ed.), at page 170, uses the following language, which is expressly approved in *Perry on Trusts*, sec. 162: "It may therefore be stated as the clear result of the authorities that where a person, being a stranger in blood to the donor, and a *fortiori*

if connected with him by blood, is in possession of an estate under a voluntary conveyance duly executed, the mere fact of his being a volunteer will not of itself create any presumption that he is a trustee for the grantor; but he will be considered entitled to the enjoyment of the beneficial interest, unless that title is displaced by sufficient evidence of an intention on the part of the donor to create a trust. And he need not bring proofs to keep his estate, but the plaintiff must bring proofs to take it from him." Nor can the non-payment of a nominal consideration expressed in a deed be proved to defeat the operation of the deed: *Draper v. Shoot*, 25 Mo. 197; *Hannibal & St. J. R. R. Co. v. Green*, 68 Id. 169; *Meriam v. Harsen*, 2 Barb. Ch. 232. And a failure to pay a valid consideration does not render the deed void, but furnishes the grantor a right of action for the stipulated consideration: *Lake v. Gray*, 35 Iowa, 459.

WHAT CONSTITUTES SUCH FRAUD AS WILL JUSTIFY ADMISSION OF PAROL EVIDENCE TO ESTABLISH TRUST FOR BENEFIT OF GRANTOR. — This is a question which it is exceedingly difficult to determine satisfactorily, and it seems impossible to reconcile some of the earlier cases on the subject. The anxiety of courts of equity to do justice in the peculiar circumstances of particular cases has often impelled them to take liberties with the provisions of the statute of frauds, which are, to say the least, at variance with our modern views as to the proper province of the courts. And very eminent judges have given utterance to principles which if applied generally would give great latitude in the admission of parol evidence in cases where fraud is alleged. Thus, Lord Hardwicke, in the case of *Reech v. Kennegal*, 1 Ves. Sr. 125, said: "The statute should never be understood to protect fraud; and therefore whenever a case is infected with fraud, . . . the court will not suffer the statute to protect it so as that any one should run away with a benefit not intended." And see *Walker v. Walker*, 2 Atk. 98. Lord Chancellor Parker, in *Montacute v. Maxwell*, 1 P. Wms. 620, said: "In cases of fraud, equity should relieve, even against the words of the statute." Lord Chancellor Thurlow, in *Shelbourne v. Inchiquin*, 1 Brown Ch. 350, said: "The moment you impeach a deed for fraud, you must either deny the effect of fraud on the deed, or you cannot but be under the necessity of admitting evidence to prove it." And Judge Story, in the case of *Jenkins v. Eldredge*, 3 Story, 290, said: "The rule in equity always has been that the statute is not allowed as a protection of fraud, or as a means of seducing the unwary into false confidence, whereby their intentions are thwarted or their interests betrayed." Lord Westbury, in the recent case of *McCormick v. Grogan*, L. R. 4 Eng. & Ir. App. 82, 89, says in more guarded language: "A court of equity proceeding on the ground of fraud converts the party who has committed it into a trustee for the party who is injured by that fraud." Taking these strong expressions with the fact thus stated by Hill, — "The court has never ventured to lay down as a general proposition what shall constitute fraud, nor can any invariable rule be established on this point": Hill on Trustees, 4th Am. ed., 224; Perry on Trusts, sec. 169, — the difficulty of deducing any satisfactory rule on the subject under consideration will be seen. Some of the early English chancery cases illustrate the lengths to which courts of equity in that country have gone in admitting evidence in case of alleged fraud. In *Hutchins v. Lee*, 1 Atk. 447, a bill was filed to set aside an assignment of a leasehold estate, and all other the estate and effects of the plaintiff, upon a suggestion that the same was never intended as an absolute assignment for the benefit of the defendant, but made only to ease the plaintiff of the trouble of managing his own concerns at that time, and subject to a

trust for the benefit of the plaintiff if he should afterwards be in a capacity of taking care of his own affairs. No trust of any kind appeared on the face of the assignment, but upon the whole circumstances of the case, the annuity reserved to the plaintiff being by no means an equivalent to the estate so disposed of, the recital in the deed of assignment that the plaintiff was under a disability at that time of taking care of his own affairs, all the effects in general being assigned as well as the leasehold estate, and after a general covenant in the deed from the defendant to indemnify the plaintiff against any breach of covenant in the original lease, and a special reservation to the plaintiff of all the timber, etc., and he to set out and allow timber for the repair of the estate, and other circumstances raised a strong presumption of a trust intended. Lord Chancellor Hardwicke admitted parol evidence to explain this transaction, namely, declarations by the defendant at the time the deed of assignment was executed, and afterwards amounting to an acknowledgment of such a trust as the plaintiff now insisted on. His lordship said such evidence was consistent with the deed, as there was all the appearance of an intended trust upon the face of it; but though there could not be a parol declaration of trust since the statute of frauds, yet this evidence was proper in avoidance of fraud, which was there intended to be put on the plaintiff, for the defendant's design was absolutely to deprive the plaintiff of all the benefit of his estate. This case is referred to by Judge Story in *Harding v. Wheaton*, 2 Mass. 389, as a case resembling that, although not so strong or pressing. The case of *Young v. Peachy*, 2 Atk. 254, held that where a father obtained an absolute conveyance from his daughter in order to answer one particular purpose, and he afterwards used it for another, a court of equity will relieve under the head of fraud.

The facts in this case were these: Zaccheus Bredon was in possession of certain real estate under a devise from his father giving him an estate therein for life, remainder to his first and other sons in tail, remainder to his daughters and their heirs, and in case they died without issue, then to the survivor or survivors of their heirs. He had no sons, but had issue two daughters, one of whom, Lydia, was married to the plaintiff Young, and the other, Margaret, was married to one Joseph Fox. Her father represented to Margaret that it would be for her benefit to join in a common recovery of the moiety of the premises so limited in remainder in tail to her, and desired her to persuade her husband to join in the same, and at the same time promised her that he would take the estate so to be created by the recovery and deed to declare the uses thereof as a trustee only for her and her heirs, and that the operation of law would be such thereupon, he not paying any consideration therefor, and that he would not claim or insist upon any advantage thereby. A recovery was accordingly suffered of this moiety, in which Margaret and her husband were vouched, and a deed was perfected in which they were parties, and the recovery was thereby declared to be to the use of Zaccheus and his heirs, but no consideration was paid to Margaret and her husband. Zaccheus subsequently became a bankrupt and afterwards died, and Margaret and her husband died shortly after, without issue and without having made any disposition of this moiety. The defendant Peachy was the assignee in bankruptcy of Zaccheus. The bill was brought by Lydia and her husband against the assignee and against a mortgagee of the estate under a mortgage from Zaccheus after he got possession of this moiety under the recovery, praying among other things that the recovery might be set aside as being unduly obtained, and that the plaintiffs might be allowed to redeem the mortgage, as this moiety had descended and of right belonged to the plaintiff Lydia and

her heirs. Lord Chancellor Hardwicke held that the plaintiffs could not be relieved under the notion of a trust, but that they had a proper ground to be relieved upon under the head of fraud. In the course of his opinion he said: "It manifestly appears the conveyance from Fox and his wife was obtained in order to answer one particular purpose, but that the father has attempted to make use of it for a very different one; and there have been a great many cases, ever since the statute of frauds, where a person has obtained an absolute conveyance from another, in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud; for a practice of this sort is a deceit and fraud which this court ought to relieve against, the doing it is *makus dolus*, and that appears to be the present case." In *Devenish v. Baines*, Prec. Ch. 4, a copyholder by his will intending to give his godson the greater part of his estate, was persuaded by his wife to nominate her to the whole, and that she would give the godson the part designed for him. After the husband's death she refused to do as she had promised, but it was decreed against her, notwithstanding the statute of frauds. All the commissioners were of opinion for the plaintiff, and said they decreed it not as an agreement or a trust, but as a fraud.

When we turn from these adjudications to the consideration of some modern American decisions on this subject, we find a much clearer, and as it seems to us a more just and satisfactory, solution of this perplexing question. In the case of *Rasdall's Adm'rs v. Rasdall*, 9 Wis. 379, it appears that the plaintiffs' intestate, Abel Rasdall, having in an encounter dangerously wounded a man, and being apprehensive of arrest and prosecution, and desirous of so arranging his affairs that he might escape from the country, conveyed his real estate to the defendant, his brother, by a deed absolute on its face, and purporting to be for a consideration of two thousand dollars. The suit was brought to enjoin the defendant from proceeding in a suit to recover possession of the property so conveyed, and to compel him to convey to the plaintiffs. The ground set forth for relief was that the conveyance was without consideration, and that the defendant agreed to hold the property in trust for the use and benefit of the grantor and his heirs. The court were satisfied from the evidence presented that the conveyance was made by the deceased under the circumstances and with the understanding set forth in the bill. But the court held that as the deed was made absolute to the defendant, without any mistake or fraud on his part, his mere refusal to perform the trust was not such a fraud as would justify the admission of parol evidence and the enforcement of the trust, because the law forbade the court to be informed that there was a trust by that kind of evidence. Paine, J., in delivering the opinion of the court, said: "We do not feel called upon to cite authorities to show that in the absence of fraud, accident, or mistake, parol evidence cannot be received to prove that a deed absolute on its face was given in trust for the benefit of the grantor; and we have not been able to find anything in this case to make it an exception. We cannot see why, if this evidence is to be received to establish this trust, every other deed in the state may not be shown by parol to have been given upon trust, and the statute of frauds be entirely annulled.

"But the counsel for the complainants, seeming conscious of the difficulty of sustaining the admissibility of this evidence for the purpose of establishing the trust, yet contended that although inadmissible for that purpose directly, it should be admitted, and the relief granted on the ground of fraud. This presents a question of very great importance, and in view of the authorities on the subject, of no little difficulty. There is no doubt that if any fraud

had been alleged, by means of which the defendant procured the conveyance from his brother to himself, or any mistake by which the instrument was made absolute, instead of expressing the trust intended, parol evidence would have been admissible to show such fraud or mistake. This conveyance would thus stand upon the same footing with all other contracts, and comes within the conceded power of courts of equity to inquire, by parol evidence, into frauds or mistakes in their procurement or execution.

"But no such fraud or mistake is alleged here. On the contrary, it appears from the whole tenor of the complaint that the conveyance was made by Abel Rasdall upon his own motion, and without any solicitation or instigation of the defendant, and that it was intended to be, as it is, absolute on its face. The only fraud alleged, therefore, is that the defendant is now claiming the property in violation of the parol trust, and whether that constitutes such a fraud as will justify a court of equity in overturning the written contract of the parties is the question presented.

"It cannot be denied that if the court can by any legal means arrive at the existence of the parol trust, then the violation of it by the defendant, in wresting their inheritance from the family of his dead brother, is most grossly fraudulent. And to avoid such injustice, courts of equity have frequently seized upon the slightest circumstances connected with the procurement of the conveyance to avoid the operation of the statute of frauds. And there are cases the principle of which would warrant the assertion that the attempt by the defendant to claim the rights which this deed on its face gives him contrary to this parol trust is such a fraud as would justify the relief upon parol evidence. But I confess my inability to see how upon principle this position can be sustained consistently with a due observance of the statute. Placing the relief in such cases upon the ground of fraud is implied by admitting that the parol evidence cannot be admitted to establish the trust for the purpose of enforcing it directly as a trust. And this is also expressly admitted. But it seems apparent to my mind that to say in such a case it shall be admitted to establish the fraud is equally a violation of the statute, because the fraud consists only in the refusal to execute the trust. The court therefore cannot say that there is a fraud without first saying that there is a trust. And the parol evidence, if admitted, must be admitted to establish the trust, in order that the court may charge the party with fraud in setting up his claim against it. Conceding, then, that they cannot execute the trust directly in such case, because it cannot be proved by parol, is it not a mere evasion of the statute to say that they will allow it to be proved by parol for the purpose of enforcing it indirectly, by charging the party with fraud for refusing to execute it? Such a course does not relieve the court from the charge of violating the statute, but subjects it to the odium of an attempted but unsuccessful evasion.

"It may be said that fraud ought not to be tolerated. That is very true, but that is not the question. The question is, whether the court, without violating the law, can get at the fraud. There is no doubt that trusts ought to be enforced; but that is not a sufficient reason for admitting parol evidence to establish them. When the party offers this, the court says, No; the law forbids it. So, however desirable it may be to prevent fraud, if the fraud cannot be established except by first showing a trust by parol, is not the same answer applicable? If not, it is difficult to see that the statute of frauds is to have any practical effect; for although trusts and agreements contrary to the written contracts of parties cannot be proved by parol so as to be enforced as such, yet they may be proved and held of sufficient force to charge the

party with fraud in not observing them. And the result is practically the same. It is for the courts to say to the parties: 'These agreements are not valid, not binding; we cannot compel you to observe them; yet if you do not observe them without being compelled, we will hold that to be a fraud on your part, and for the fraud will compel you to execute them.' It is impossible to reconcile with principle very many of the adjudications upon the statute of frauds. Courts seem to have been so intent upon administering justice in the particular case that they have frequently lost sight of its provision, and their action has often amounted to little less than the exercise of the right to repeal or suspend its operation whenever they deemed that the real justice of the case required it. But the progress of adjudication upon the subject has been marked by many strong protests against the wide departure from principle, and the regrets expressed by courts that it had ever obtained. And the current of modern authority is in favor of returning to the due observance of the provisions of this law, according to their obvious intent. But the distinction between fraud in procuring a conveyance, and that which arises only from the refusal to execute a parol trust or agreement, connected with a conveyance obtained without fraud, is not only clear upon principle, but is not without sanction."

In *Bonham v. Craig*, 80 N. C. 224, the grantor conveyed to the grantee for an expressed consideration of two thousand one hundred dollars, although in reality no consideration was paid, certain lands, as the plaintiff alleged upon the express oral agreement that upon the grantor's return to the state the grantee should reconvey to him, and that the grantee should have no beneficial interest therein unless the grantor should die before he should return to the state. It was held that the parol agreement of the grantee to reconvey the land, made at the time it was conveyed to him by a deed absolute on its face, — no accident, fraud, mistake, or undue advantage being alleged, — could not be enforced upon parol evidence; and that no such evidence was competent to set up and attach the agreement to the conveyance as a trust or otherwise. Said Smith, C. J., in delivering the opinion of the court: "Nor will it avail the plaintiff to treat the alleged agreement as raising a trust which, not being within our statute of frauds, may be enforced upon sufficient parol proof. The case made in the complaint on which relief is sought is the omission to insert in the deed a clause limiting the estate conveyed upon the grantee's undertaking to restore the property, and reconvey title when the grantor returned, and the equity arising out of his refusal to do so. This is not a trust within the scope of any of the numerous adjudications to which our attention was called in the elaborate argument of counsel. It involves the question of the admissibility of evidence outside of the deed to control its operation, and impose upon the grantee an obligation on the contingency which has happened to reconvey the land. Upon principle and authority, we think this cannot be done."

In *Fouty v. Fouty*, 34 Ind. 433, the complaint charged "that the defendant, with the fraudulent intent to deprive said Amos of said land, represented to him that if he would convey said land to him (defendant) by deed in fee-simple, he, the defendant, would hold the same in trust for said Amos and Jane, and would reconvey the same to said Amos at any time on request, or in case of his death, to said plaintiff; that, trusting to said representations, the said Amos and Jane, upon said day, without any consideration whatever, either good or valuable, executed to the defendant an unconditional warranty deed." Pettit, C. J., delivering the opinion of the court, referring to this allegation, said: "This is not such a fraudulent representation as will avoid a

dead. Representations upon which fraud can be predicated must be of an existing fact, or of a fact alleged to exist, and not a mere promise to do something afterwards." In *Newton v. Taylor*, 32 Ohio St. 399, it was decided that where the defendant participates in bringing about the arrangement, induces the result, and takes in confidence what he cannot retain without bad faith and fraud, he becomes a trustee by virtue of his own wrongful acts. And the trust in such a case may be proved by parol.

From these decisions, and others cited below, the following propositions seem to be deducible: 1. In the absence of fraud, accident, or mistake, parol evidence is inadmissible to establish a trust in land conveyed by an absolute deed: *Dunn v. Dunn*, 82 Ind. 42; *Mecall v. Tully*, 91 Id. 96; *Pennington v. Flock*, 93 Id. 378; *Brown v. Combs*, 29 N. J. L. 36; *Bird v. Morrison*, 12 Wis. 138; *Sweet v. Mitchell*, 15 Id. 641; *Butler v. Butler*, 46 Id. 439; *Pavey v. American Ins. Co.*, 56 Id. 221; *Heiss v. Vosburg*, 59 Id. 532. A parol trust is not, however, an absolute nullity, but is simply void at the election of the trustee. If he executes it, the courts will protect him in so doing, and as far as possible, will protect the beneficiaries in the enjoyment of the fruits thereof: *Karr v. Washburne*, 56 Wis. 303. 2. A false representation upon which fraud may be predicated must be of an existing fact, or a fact alleged to exist at the time, and cannot consist of a promise to be performed in the future: *President and Trustees of Hartsville University v. Hamilton*, 39 Ind. 352; *Noble v. State*, 39 Id. 352; *State v. Prather*, 44 Id. 287; *Adkins v. Adkins*, 48 Id. 12; *Hayes v. Burkam*, 51 Id. 130; *Reagan v. Hadley*, 53 Id. 509; *Weisbillig v. Dienhart*, 65 Id. 94; *Burt v. Bowles*, 69 Id. 1; *Bethell v. Bethell*, 92 Id. 318; *Gallagher v. Brunel*, 6 Cow. 347. Even an unconscientious refusal to perform an alleged promise to reconvey is not in itself such a fraud as can displace the statute of frauds: *Johnston v. La Motte*, 6 Rich. Eq. 347. 3. Where there is fraud in the obtaining of the conveyance, or in the means used to secure its execution in the particular manner in which it is executed, or where by accident or mistake the deed fails to express the real intention of the parties, parol evidence may be admitted for the purpose of affording relief to the party injured: *Kennedy v. Kennedy*, 2 Ala. 571; *Skrine v. Simmons*, 11 Ga. 401; *Hoge v. Hoge*, 1 Watts, 163; *Johnston v. La Motte*, 6 Rich. Eq. 347.

WHERE FRAUD IS CHARGED, the bill must allege it clearly and distinctly: *Perry on Trusts*, sec. 226; *Irrham v. Child*, 1 Brown Ch. 94; *Portmore v. Morris*, 2 Id. 219; *McCalmont v. Rankin*, 8 Hare, 18; *Kennedy v. Kennedy*, 2 Ala. 571; *Gouverneur v. Elmendorf*, 5 Johns. Ch. 79; *Forsyth v. Clark*, 3 Wend. 637. But it is not necessary to allege the perpetration of fraud *in totidem verbis*. If the bill states with distinctness and precision facts and circumstances which in themselves amount to fraud, it is as unobjectionable as if the very terms itself were employed: *Kennedy v. Kennedy*, 2 Ala. 571; *Skrine v. Simmons*, 11 Ga. 401.

THE PRINCIPAL CASE IS CITED to the point that a voluntary deed without consideration is good against the grantor and his heirs, and can be avoided only by some one having equities against it: *Ryan v. Brown*, 18 Mich. 207; provided it is made with deliberation, without mistake, and without contrivance: *Barber v. Milner*, 43 Id. 249. In *Kimball v. Myers*, 21 Id. 285, it is held that it is competent to show by parol that a mortgage given to secure the payment of a specified sum of money was in fact given to protect the mortgagee as a surety for the mortgagor upon a promissory note for the same sum, and made at the same time the mortgage was given, as the effect of such proof is not to contradict or vary the mortgage, but to identify the demand to which it refers; and the principal case and others are distinguished.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

CITY OF ST. PAUL v. CHARLES COLTER.

[12 MINNESOTA, 41.]

CONSTITUTIONAL LAW — POLICE POWER MAY BE DELEGATED TO MUNICIPAL CORPORATIONS under the general power of the legislature to establish such corporations.

MUNICIPAL LICENSE TAX UPON BUTCHERS' SHOPS MAY BE AUTHORIZED by the legislature. The business of vending butchers' meats is a legitimate subject of police and sanitary regulations.

AMOUNT OF BUSINESS LICENSE FEE IS DISCRETIONARY with the legislature, and may be left by law to the discretion of the city authorities. Such discretion is not subject to judicial review when not grossly abused.

EVIDENCE THAT AMOUNT IS NOT REASONABLY NECESSARY to regulate the business is not admissible; nor can it be shown that the fee was imposed solely for purposes of revenue.

MUNICIPAL REGULATIONS IN RESTRAINT OF TRADE may be authorized by law; and in case of oppressiveness, the remedy lies with the law-making power.

CONSTITUTIONAL REQUIREMENT THAT SUBJECT AND TITLE OF STATUTE SHALL BE SINGLE is not violated by an act to amend a city charter because providing that a county tax collector shall pay city taxes collected by him into the city treasury.

COUNTY TAX COLLECTOR IS CITY OFFICER *pro hac vice* when collector of city taxes.

MUNICIPAL ORDINANCE MAY BE PUBLISHED AT ANY TIME when the time of publication is not fixed by statute.

THE defendant was convicted by the city justice of the violation of an ordinance of the city of St. Paul, passed May 4, 1865, which, under penalty, forbade any one to keep a butcher's stall, or vend fresh or butcher's meat in less quantities than the quarter, within the city, without first obtaining a license

therefor, and which fixed the license fee required at two hundred dollars. On the trial, the defendant offered to prove "that the sum of two hundred dollars is not required or necessary to regulate his said business, but said sum is required solely for the purpose of raising a revenue; that by said ordinance he is required to pay much more than his share towards the support of the city government in order to carry on his business; that the payment of said two hundred dollars for license, and the restriction placed upon his said business by said city, is unreasonable and unnecessary, and the price of meat enhanced thereby, and the sale restrained; that it is wholly unnecessary to regulate the butchers' business, and oppressive to butchers." This offer of testimony was rejected, and its rejection was assigned as error.

Smith and Gilman, and S. M. Flint, for the appellant.

I. V. D. Heard, for the respondent.

By Court, BERRY, J. Unquestionably the legislature of this state would possess authority under a general power of legislation, as that function is commonly understood and exercised, to establish municipal corporations. Besides, our constitution places this matter beyond doubt when it says, in section 2 of article 10: "No corporation shall be formed under special acts except for municipal purposes": See *Tierney v. Dodge*, 9 Minn. 166 (Gil. 153). And the object in chartering these municipal bodies is to confer special privileges and police powers designed to meet the necessities of the case; among these is the privilege of enacting by-laws and ordinances by which the good order, the health, and general well-being of the municipality may be secured. Undoubtedly this is a species of delegated legislation; but there can be no valid objection to it on that score, for the authority to establish these municipal corporations, in its commonly received acceptation, implies the power to establish with the privileges which are ordinarily a part of the chartered rights of such bodies politic. The regulation and licensing of butcher-shops are some of the privileges allowed to incorporated cities: Sedgwick on Statutory and Constitutional Law, 463-466. We think there can be no doubt of the power of the legislature to enact section 5, chapter 16, of the Special Laws of 1865, page 123, whereby authority is granted to the common council of the city of St. Paul, "by ordinance, resolution, or by-laws, to license and regulate . . . butchers' shops and butchers' stalls, and venders of butchers'

meat, . . . provided that they be not repugnant to the constitution and laws of the United States, or of this state." Section 5, above cited, further provides "that not less than five dollars nor more than five hundred dollars shall be required to be paid for any license under this act"; and with some apparent repetition, adds that "said common council may at any time revoke any license granted under this act for misconduct in the course of trade, and may regulate and restrain the sale of fresh or butchers' meat," etc.

It will be at once seen that quite extensive powers are thus bestowed upon the city council, for the purpose, doubtless, of establishing an efficient municipal government; and these powers do not depend, as in many of the English cases in which questions have arisen somewhat analogous to those raised in this action, upon customs the existence of which was in dispute, but they are conferred by express legislation. It is not contended, nor could it be with reason, that the city council might not with propriety be authorized to fix upon some amount as the price of a license in a case of this kind, but it is urged that the ordinance by which such price is fixed at two hundred dollars is, on account of the exorbitance of that sum, "unauthorized, void, oppressive, and in restraint of trade"; that "municipal corporations can only regulate trades or employments that are liable in and of themselves to become nuisances, or injurious to the public if not properly supervised or carried on"; that "such corporation cannot prohibit the conduct of a lawful business"; that "these powers, legislative and otherwise, are confined to sanitary and police regulations"; that "the legislature of the state cannot authorize a corporation to pass laws, save only such as are reasonable, and in regulation of employments that may become offensive"; that "legislation, other than mere by-laws punishing nuisances when they exist, or disturbances of the public quiet, cannot be delegated." So far as the exorbitance of the price of the license is concerned, we have seen that the common council is empowered by the statute to fix it at five or five hundred dollars, or at any point between. This power is given as much with regard to licenses of butchers' shops as with regard to any other species of license. What limits should be imposed upon the licensing power was a matter for the legislature to determine,—a matter dependent upon the judgment and discretion of the legislature. In such case, we do not think it proper to question the exercise of legislative discretion. It is

possible there may be instances where this discretion is so grossly and manifestly abused that the courts may be called upon to pronounce its exercise a usurpation; but it will be time enough to dispose of the questions which might arise under such circumstances when they are presented for adjudication.

Under any reasonable system of government, much must be left to human discretion, exercised upon the facts and necessities of the case in hand. We think that it was competent for the legislature to authorize the common council to fix the price of licenses at a sum from five to five hundred dollars. We think it was competent for the legislature, within proper limits, to leave the sum which should be required in the discretion of the common council; for the very object of a charter is to empower them to provide for the well-being of the city by such regulations and ordinances as their daily observation of what is going on around them will qualify them to enact more judiciously than a body constituted as a state legislature ordinarily is could be expected to do. We are unable to see any abuse of discretion in the passage of the ordinance in question. It occurs to us that if there is any kind of business transacted in a city "which is liable in and of itself to become a nuisance or injurious to the public if not properly supervised or carried on," or which "may become offensive," or which is a legitimate subject of "sanitary regulations," it is pre-eminently this very business of vending fresh and butchers' meats. The requirement of any license, or the enforcement of any regulation upon business, is to some extent necessarily "in restraint of trade"; but it does not therefore follow that such requirement or regulation is "unauthorized, void, or oppressive." It is in this case authorized by the legislature, and not being forbidden by the constitution, it is therefore not void, but has the force of law; and if it be oppressive, the remedy, as in many other cases, lies with the legislature or common council: *Presb. Ch. v. City of New York*, 5 Cow. 540; *Stuyvesant v. Mayor etc. of New York*, 7 Id. 604; *McDermott v. Board of Police*, 5 Abb. Pr. 434. *Prima facie*, the presumption would be that the ordinance in question in this case is valid as being within the scope of the powers of the common council; and this presumption is not overcome in our mind by anything going to show that the imposition of the license is a cover for unequal taxation, or for a burden or restraint upon freedom of trade, not warranted by

the terms of the charter, or the legitimate purposes for which such charters may be granted. Nor is it manifest to us that the common council have transcended or gone outside of the police power which may be properly conferred upon them.

We think the testimony offered for the purpose of showing "the amount" of license "reasonably necessary to regulate the business" in which the plaintiff in error was engaged was properly rejected. What part of the expenses of maintaining a police force, or otherwise sustaining a city government, should be paid by butchers' licenses could not furnish *data* from which to determine the reasonableness of the price of the license. We think it was entirely legitimate for the council, in fixing the sum which should be required for a license, to look at numerous considerations; perhaps, among others, at the probability that the city might be put to great expense in litigation, and to other expenses arising out of this business, as well as at the expediency of fixing such price as to prevent any person from embarking in this business who could not furnish such evidence of his responsibility as the payment of two hundred dollars for a license and as a stake for his good behavior,—a stake which he was liable to forfeit, if, in the language of section 5, his license should be revoked "for malconduct in the course of trade." Nor is it all-important whether these licenses produce a revenue to the city or not. If it was proper to impose licenses, the moneys realized must go somewhere; and we can think of no more appropriate place than the city treasury. There cannot possibly be anything in the point made that the ordinance confiscates the property of the plaintiff in error by rendering the building which he has erected for a meat-shop useless unless he submits to the payment of two hundred dollars and takes out a license.

It is insisted that chapter 16 of the special laws of 1865, p. 121, is void, because it violates section 27 of article 4 of our constitution, by which it is declared that "no law shall embrace more than one subject, which shall be expressed in its title." It is claimed that section 7 of chapter 16, by which it is provided in substance that the collector of taxes for Ramsey County shall pay over his collections on account of the city to the city treasurer on the first Monday of each month, relates to a different subject from the balance of the chapter, which is devoted to amendments to certain specified sections of the city charter. The title of the chapter is, "An act to amend the charter of the city of St. Paul."

We think section 7 may with propriety be regarded as an amendment to such charter, and that the law does not embrace more than one subject on account of the insertion of section 7 any more than it does on account of the insertion of the preceding sections, which relate to different matters of detail, but to the same general subject, to wit, the government and management of the affairs of the city of St. Paul. As observed by the counsel for the appellant, the collector of Ramsey County is collector of city taxes, and *pro hac vice* a city officer: See *Board of Supervisors v. Heenan*, 2 Minn. 330 (Gil. 281); *Tuttle v. Strout*, 7 Minn. 465 (Gil. 374).

The point made as to the irregularity of the passage of the ordinance was understood upon the argument to be abandoned; at any rate, we see nothing in it, nor in the further objection that the ordinance was passed on the 4th of May, and not published till the 9th of September, between which dates several meetings of the council had taken place. Section 23 of chapter 10 of the charter enacts that "the common council shall cause all publications made by authority of the city to be inserted in the first column of the third page of the newspaper doing the city printing." This is admitted to have been done in this case, and the statute does not fix any particular time within which it must be done.

It is unnecessary to extend this opinion further than to say that, as we perceive no error, the judgment below must be affirmed.

DELEGATION OF LEGISLATIVE POWER TO MUNICIPAL CORPORATIONS: See *Robinson v. Mayor of Franklin*, 34 Am. Dec. 627, note, and cases cited; *Commonwealth v. Kimball*, 35 Id. 336, note, and cases cited; *Mobile v. Yuille*, 36 Id. 441; *Tanner v. Trustees*, 40 Id. 337; *Ash v. People*, 83 Id. 740; *Caldwell v. City of Alton*, 85 Id. 282. A municipal corporation can only act within the limits of its delegated authority: *Baltimore v. Hughes*, 19 Id. 243; *Robinson v. Mayor of Franklin*, 34 Id. 625; *Raleigh v. Dougherty*, 39 Id. 149; *Collins v. Hatch*, 51 Id. 465; *City of St. Paul v. Laidler*, 72 Id. 89; *Phillips v. Allen*, 82 Id. 486; *Caldwell v. City of Alton*, 85 Id. 189. For the valid exercise of police power by municipal corporations, see *Milne v. Davidson*, 16 Id. 189; *Vandine, Petitioner*, 17 Id. 351; *Tourne v. Lee*, 20 Id. 260; *Baker v. Boston*, 22 Id. 421; *Wadleigh v. Gilman*, 28 Id. 188; *Goddard, Petitioner*, 28 Id. 259; *Mayor v. Beasley*, 34 Id. 646; *Mobile v. Yuille*, 36 Id. 441; *Floyd v. Commissioners of Eaton*, 58 Id. 559; *Goddard v. Jacksonville*, 60 Id. 773; *State v. Clark*, 61 Id. 611; *Shelton v. Mayor of Mobile*, 68 Id. 143; *City of St. Paul v. Laidler*, 72 Id. 89; *Bethune v. Hughes*, 73 Id. 789; *City of Pekin v. Swaelmel*, 74 Id. 105; *Ash v. People*, 83 Id. 740; *Caldwell v. City of Alton*, 85 Id. 282.

MUNICIPAL LICENSE TAX UPON SALE OF MEATS: See *Ash v. People*, 83 Am. Dec. 740; *Peck v. City of Austin*, 73 Id. 261; *Shelton v. Mayor of Mobile*, 68 Id. 143.

AMOUNT OF BUSINESS LICENSE TAX: See *City of Cincinnati v. Bryson*, 45 Am. Dec. 593; *Ash v. People*, 83 Id. 740.

REASONABLENESS OF LEGISLATIVE ACTION NOT SUBJECT TO JUDICIAL REVIEW: See *Armington v. Barnett*, 40 Am. Dec. 705; *Moor v. Veazie*, 52 Id. 655; *People v. Mayor*, 55 Id. 266; *Sharpley v. Mayor of Philadelphia*, 59 Id. 759.

MUNICIPAL REGULATIONS IN RESTRAINT OF TRADE: See *Vandine, Petitioner*, 17 Am. Dec. 351; *Mobile v. Yuille*, 36 Id. 441; *Ash v. People*, 83 Id. 282.

CONSTITUTIONAL REQUIREMENT AS TO SUBJECT AND TITLE OF STATUTE: See *Martin v. Broach*, 50 Am. Dec. 306, 317, note, and cases cited; *Belleville R. R. Co. v. Gregory*, 58 Id. 600, note, and cases cited; *Davis v. State*, 61 Id. 331, 337, note, and cases cited; *People v. McCann*, 69 Id. 642, 648, note, and cases cited; *Firemen's Benev. Ass'n v. Loundsbury*, 74 Id. 115, 119, note, and cases cited; *Parkinson v. State*, 74 Id. 522, 534, note, and cases cited; *Garbert v. Jeffersonville R. R. Co.*, 71 Id. 359, note, and cases cited; *Santo v. State*, 63 Id. 487; *Chiles v. Drake*, 74 Id. 406; *Tadlock v. Eccles*, 73 Id. 213; *Denham v. Holman*, 71 Id. 198; *Keller v. State*, 69 Id. 226; *Tuttle v. Strout*, 82 Id. 108, 110, note, and cases cited.

THE PRINCIPAL CASE IS CITED IN THE FOLLOWING CASES TO THE POINTS SPECIFIED: No exercise of police power which is authorized by a city charter can be unlawful and void: *City of Rochester v. Upman*, 19 Minn. 112. It is not important whether a license fee imposed under the police power produces a revenue to the city: *State v. Cassidy*, 22 Id. 321. Municipal corporations have such powers of local self-government as have been usually exercised in England and in this country: *State v. Lee*, 29 Id. 454. Discretionary exercise of police power is *prima facie* valid, and cannot be set aside unless the discretion is manifestly abused: *Knobloch v. C. M. & St. P. R'y Co.*, 31 Id. 404. Any separate provision or matter of detail which comes fairly within the general scope and purpose of a law is not violative of the constitutional requirement that a statute shall have but one subject, to be expressed in its title: *State v. Cautieny*, 34 Id. 7; *Miss. and Rum River Boom Co. v. Prince*, 34 Id. 85.

HAMLIN v. PARSONS AND WIFE.

[12 MINNESOTA, 103.]

MORTGAGE LIEN UPON HOUSE REMOVED FROM MORTGAGED LOT without the consent of the mortgagee continues upon the house as to all who have notice, but cannot attach to the lot to which it is removed. Such house will be ordered sold in case the proceeds of the mortgaged lot are insufficient; but not otherwise.

BUILDING IS NOT PART OF REALTY WHEN AGREEMENT OR EQUITABLE CIRCUMSTANCES make it the property of another than the owner of the realty.

TROVER LIES FOR FIXTURE REMOVED without the consent of the owner of the land. The rights of the owner of a conditional estate in the premises as mortgagee or otherwise differ only in extent from those of the owner of the land, and will be protected from invasion.

ACTION of foreclosure of mortgage. Error to district court, Stearns County. Parsons and wife executed to Hamlin a mortgage upon a house and lot in St. Cloud, and afterward,

without the consent of Hamlin, Parsons removed the house to another lot, belonging to his wife. Parsons was insolvent, and the mortgaged lot was insufficient security for the mortgage debt. Hamlin sought to foreclose the mortgage upon both lots, which relief was granted by the court below. Parsons and wife are plaintiffs in error.

Brisbin and Warner, for plaintiffs in error.

Allis and Williams, for defendant in error.

By Court, **BERRY, J.** The mortgage upon which this action is founded covered lot 6 only, and the fact that the house situated on said lot when the mortgage was executed was subsequently removed to lot 7 would have no tendency to extend the lien of the mortgage to the latter lot; nor do we perceive how the judgment in this case could be made a lien upon lot 7, nor with what propriety lot 7 could be ordered to be sold in satisfaction of the mortgage debt. This view of the matter seems to be acquiesced in by the counsel for defendants in error in their brief. So far as the house was concerned, it was a part of the property covered by the mortgage, and it contributed largely to the value of the security. As it was removed from lot 6 without the knowledge or consent of the mortgagee, and with the knowledge of all the parties claiming any rights adverse to those of the mortgagee, we see no reason why such mortgagee should not be permitted to follow the house after having exhausted lot 6, and apply it if necessary to the payment of the mortgage debt: *Hutchins v. King*, 1 Wall. 53. This course would give the mortgagee the benefit of the security for which he contracted. Ordinarily, a building is a part of the realty to which it is attached, but an exception to this rule is admitted "where there is an agreement, express or implied, between the owner of the real estate and the proprietor of materials and buildings that when annexed to the realty they shall not become part of it, but shall still remain the property of the person annexing them": *Wells v. Banister*, 4 Mass. 514; 5 Pick. 487; 8 Id. 402; *First Parish etc. v. Jones*, 8 Cush. 190; *Wood v. Hewitt*, 8 Ad. & E., N. S., 919; *Smith v. Benson*, 1 Hill, 178. See also *Lafin v. Griffiths*, 35 Barb. 58; *Moore v. Wait*, 3 Wend. 108; 2 Smith's Lead. Cas. 261; 1 Id. 663. This doctrine is also recognized by our own statutes: Gen. Stats., c. 68, sec. 6, p. 498. An analogous exception to the general rule above referred to is also admitted as between landlord and tenant. It does not, then, necessarily follow that

a building is a part of the realty to which it is attached, nor that the house in this case became a part of lot 7 by the removal thereupon, and so escaped from the lien of the mortgage. If one person can by agreement, express or implied, be the owner of a dwelling-house upon the land of another, a *fortiori*, where a building, part of A's realty, is removed therefrom by B, and annexed to B's land, or that of a third person privy thereto, all without A's consent, it would seem that A would not be deprived of his property in the building, either by the severance or annexation. In the case of fixtures removed under similar circumstances, it has frequently been held that trover would lie: *Ferard on Fixtures*, 295 et seq. And it would make no difference except as to the extent of A's right whether A was absolute owner of the premises from which the building was taken, or possessed of a conditional estate therein as mortgagee, or otherwise. Such rights as he had should not be taken away from him by robbery. We see no reason why complete relief should not be afforded the mortgagee in this action. As lot 6 is to be first sold, if its proceeds satisfy the judgment, the house will not be sold at all. If upon the sale lot 6 proved insufficient, then the house will be called upon for the unsatisfied balance, or as much of it as it will pay. There is no unfairness in this. The facts in the case do not show that the questions arising as to the right of the mortgagee to a lien upon the house are complicated by any such substantial alterations in the building as have sometimes been held to affect and change the title to property altered from its original form, nor by any intervening rights of innocent third parties. In accordance with these views, the judgment must be modified by striking out that portion of it which adjudges a lien upon lot 7, and a sale thereof, and so as to confine the lien and sale to lot 6 and the house, with such other changes as may be necessary to conform the judgment to this modification.

EQUITY WILL ENFORCE LIEN UPON FIXTURES REMOVED to the detriment of a lien-holder: See *Gray v. Holdship*, 17 Am. Dec. 680, 690, note, and cases cited; *Voorhis v. Freeman*, 37 Id. 490; *Pyle v. Pennock*, 37 Id. 517; *Witmer's Appeal*, 84 Id. 505.

WHEN BUILDING OR FIXTURE IS NOT PART OF REALTY: See *Russell v. Richards*, 26 Am. Dec. 532, 539, note, and cases cited; *Osgood v. Howard*, 30 Id. 322; *Curtis v. Hoyt*, 48 Id. 149, 158, note, and cases cited; *Tess v. Hewitt*, 59 Id. 634; *Foster v. Mabe*, 37 Id. 749; *Providence Gas Co. v. Thurber*, 55 Id. 621; *Dame v. Dame*, 75 Id. 195.

TROVER OR REPLEVIN FOR FIXTURES CONVERTED OR REMOVED: See *Osgood v. Howard*, 20 Am. Dec. 322; *Russell v. Richards*, 26 Id. 539; *Harlan v. Harlan*, 53 Id. 612; *Dame v. Dame*, 75 Id. 195; *Bliss v. Whitney*, 85 Id. 745.

THE PRINCIPAL CASE IS CITED in the following cases to the points stated: Mortgagees may follow timber converted into logs if necessary to preserve his security: *Berthold v. Holman*, 12 Minn. 345. Chattels annexed to realty will remain chattels if the intention of the parties appears, either by agreement or from the special relation of the parties: *Warner v. Kennedy*, 25 Id. 175. When a vendee in possession under a contract of sale commits waste by cutting timber, the vendor may maintain trover against a *bona fide* purchaser of the timber cut: *Whitney v. Huntington*, 34 Minn. 463.

MASSEY v. GORTON.

[12 MINNESOTA, 145.]

CREDITOR'S BILL TO SET ASIDE FRAUDULENT CONVEYANCE by a debtor will not lie until judgment has been obtained against the debtor.

VENDOR'S LIEN does not exist in favor of an assignee of a note for purchase-money assigned after conveyance of the land to the wife of the vendee.

THE facts referred to in the opinion, upon which the claim for a vendor's lien was based, sufficiently appear in the *syllabus* above.

Brisbin and Warner, for the plaintiff in error.

George L. Otis, for the defendant in error.

By Court, McMILLAN, J. The defendant in error, the plaintiff below, is a simple contract creditor, and as such comes into a court of equity, and seeks to set aside a conveyance of land as fraudulent, and have the grantee declared a trustee of the premises for his use, etc., under the statute: Comp. Stat.. p. 382, secs. 7, 8.

A fraudulent conveyance, so far as creditors are concerned, can be avoided by them only after they have obtained judgment. The defendant in error, being a simple contract creditor merely, cannot in this action obtain the relief he seeks. He must first obtain his judgment at law, and then invoke the aid of a court of equity in his behalf: *McCartney v. Bostwick*, 31 Barb. 390; 1 Am. Lead. Cas., 4th ed., 45; *Hastings v. Belknap*, 1 Denio, 191, 198.

We see nothing in the facts of this case upon which the claim by the defendant in error of a vendor's lien upon the premises can be sustained. As these views dispose of the present action, the further points in this case need not be considered.

The judgment below is reversed, and the cause remanded for further proceedings.

CREDITOR'S BILLS, AND PROCEEDINGS IN EQUITY IN AID OF EXECUTIONS.

—1. *Prerequisites to Creditor's Suit.*—The doctrine that a mere creditor at large, who has obtained no judgment at law or specific lien upon the property sought to be charged, has no standing in equity to enforce a creditor's bill, is elementary, and is sustained as a rule of decision by the whole current of authority. Proceedings in equity by creditors are usually allowed only in aid of execution. It is well settled that a creditor must first exhaust his remedy at law before filing a bill in equity: *Gilpin v. Davis*, 5 Am. Dec. 622; *Scott v. McMillen*, 13 Id. 239; *Chamberlayne v. Temple*, 14 Id. 786; *Allen v. Camp*, 15 Id. 109; *Screven v. Bostick*, 16 Id. 664; *Donaldson v. Bank of Cape Fear*, 18 Id. 577, note, and cases cited; *Corning v. White*, 22 Id. 661, note, and cases cited; *Birely's Ex'rs v. Staley*, 25 Id. 303, note, and cases cited; *Reed v. Wheaton*, 34 Id. 366, note, and cases cited; *Stone v. Manning*, 35 Id. 119, note, and cases cited; *Brown v. Long*, 36 Id. 43, note, and cases cited; *Miller v. Davidson*, 44 Id. 715, 722, note, and cases cited; *Thurmond v. Reese*, 46 Id. 440; *Rice v. Barnard*, 50 Id. 54; *Withers v. Carter*, 50 Id. 78; *Mews v. Anthony*, 52 Id. 274; *Unknown Heirs v. Kimball*, 58 Id. 638; *Brittain v. Quiet*, 62 Id. 202; *Snodgrass v. Andrews*, 64 Id. 169, note, and cases cited; *Dunham v. Cox*, 64 Id. 460; *Heyneman v. Dannenberg*, 65 Id. 519; *Grimsley v. Hooker*, 67 Id. 227, note, and cases cited; *Green v. Kornegay*, 67 Id. 261, note, and cases cited; *Uhl v. Dillon*, 69 Id. 172; *Cook v. Johnson*, 72 Id. 381; *Bickerstaff v. Doub*, 79 Id. 204; *Jones v. Green*, 1 Wm. 330; *Heacock v. Durand*, 42 Ill. 230; *Anderson v. Bradford*, 5 J. J. Marsh. 69; *Howell v. Cooper*, 37 Barb. 582; *Henderson v. McVey*, 32 Ala. 471; *Fletcher v. Holmes*, 40 Mo. 364; *Brown v. Bank of Mississippi*, 31 Miss. 454; *Taylor v. Robinson*, 7 Allen, 253; *Vasser Henderson*, 40 Miss. 519; S. C., *post*, p. 351; *McCartney v. Bostwick*, 31 Barb. 390; *Adsit v. Butler*, 87 N. Y. 585; *McMinn v. Whelan*, 27 Cal. 300; *Sezey v. Adkinson*, 34 Id. 346; *Mesmer v. Jenkins*, 61 Id. 153; *Cubbedge v. Adams*, 42 Ga. 124; *Tyler v. Peatt*, 30 Mich. 63; *Tolbert v. Horton*, 31 Minn. 520; *Dahlman v. Jacobs*, 15 Fed. Rep. 863; *Dormuel v. Ward*, 108 Ill. 216. In order to reach concealed personal property, or equitable assets of the debtor, most of the cases hold it to be an imperative rule that execution must issue and be returned *nulla bona* before the creditor's suit is commenced: *Gilpin v. Davis*, 5 Am. Dec. 622; *Chamberlayne v. Temple*, 14 Id. 786; *Beck v. Burdett*, 19 Id. 436; *Edmeston v. Lyde*, 19 Id. 454; *Birely's Ex'rs v. Staley*, 25 Id. 303; *Reed v. Wheaton*, 34 Id. 366; *Brown v. Long*, 36 Id. 43, note, and cases cited; *Miller v. Davidson*, 44 Id. 715, 722, note, and cases cited; *Chautaugus Bank v. White*, 57 Id. 451, note, and cases cited; *Brittain v. Quiet*, 62 Id. 202, and cases cited; *Morgan v. Crabb*, 3 Port. 470; *Roper v. Cook*, 7 Ala. 318; *Wright v. Petrie*, 1 Smedes & M. 282; *Scott v. Wallace*, 4 J. J. Marsh. 654; *Parish v. Lewis*, 1 Freem. Ch. 299; *Hogan v. Burnett*, 37 Miss. 617; *Vasser v. Henderson*, 40 Id. 519; S. C., *post*, p. 351; *Fleming v. Grafton*, 54 Id. 89; *Partee v. Matheews*, 53 Id. 146; *McIlwain v. Willie*, 9 Wend. 548; *McCartney v. Bostwick*, 31 Barb. 390; *Henderson v. McVey*, 32 Ala. 471; *Brown v. Bank of Mississippi*, 31 Miss. 454; *Castle v. Bader*, 23 Cal. 76, and cases cited; *Newman v. Willetts*, 52 Ill. 98; *Morgan v. Bogue*, 7 Neb. 429. But it has been held that execution need not be issued or returned before filing a creditor's bill in any case where the property is in such a condition that it cannot be reached by execution: *Snodgrass v. Andrews*, 64 Am. Dec. 167, 173, and cases cited. It has further been held that when the fact of the utter insolvency of the judgment debtor is otherwise made to appear to the court of equity, it is not essential that it should be proven by the formal issuance and return of execution: *Heyneman v. Dannenberg*, 65 Id. 519; *Walker v.*

Sedgwick, 8 Cal. 403; *Harris v. Taylor*, 15 Id. 348; *Hager v. Schindler*, 29 Id. 58; *Postlewait v. Howes*, 3 Iowa, 365; *Turner v. Adams*, 46 Mo. 95; *Harrison v. Battle*, 1 Dev. Eq. 537; *Tabb v. Williams*, 4 Jones Eq. 352; *contra: Crippen v. Hudson*, 13 N. Y. 182; *McElwain v. Willis*, 9 Wend. 548; *Mizon v. Dunklin*, 48 Ala. 455; *Parish v. Lewis*, 1 Freem. Ch. 299. Yet the mere insolvency of the debtor, however clearly established, cannot constitute an exception to the rule that judgment must first be obtained at law before the creditor can sue in equity: *Meux v. Anthony*, 52 Am. Dec. 274. When the creditor's right rests upon a lien acquired by attachment or execution, the return of execution *nulla bona* cannot be required, since such return would defeat the very right which it is sought to enforce: *Heye v. Bolles*, 33 How. Pr. 266; *Buswell v. Links*, 8 Daly, 518, and cases cited. Nor need a creditor who already has an equitable lien levy an execution in order to obtain a lien: *New London Bank v. Lee*, 27 Am. Dec. 713.

When the object of the bill is to reach real estate which has been fraudulently transferred by the judgment debtor for the purpose of defeating his creditors, many decisions uphold the doctrine that execution need not be returned unsatisfied before commencing the creditor's suit, since the judgment itself operates as a sufficient lien to support the jurisdiction of chancery to remove the fraudulent conveyance: *Snodgrass v. Andrews*, 64 Am. Dec. 169; *Dunham v. Cox*, 64 Id. 480, note, and cases cited; *Miller v. Davidson*, 44 Id. 715, 722, note, and cases cited; *Dargan v. Waring*, 46 Id. 234; *Chautaugue Bank v. White*, 57 Id. 452, note, and cases cited; *Witmer's Appeal*, 64 Id. 505; *Bomberger v. Turner*, 82 Id. 438; *Brinkerhoff v. Brown*, 4 Johns. 674; *McNairy v. Eastland*, 10 Yerg. 310; *Rhodes v. Cousins*, 6 Rand. 188; *West v. McCarty*, 4 Blackf. 244; *Payne v. Sheldon*, 63 Barb. 169; *Loving v. Pairo*, 10 Iowa, 282; *Cornell v. Radway*, 22 Wis. 280; *Armstrong v. Keifer*, 37 Ind. 225; *Newman v. Willets*, 52 Ill. 98; *Vasser v. Henderson*, 40 Miss. 519; S. C., *post*, p. 351; *Partee v. Matthews*, 53 Id. 146; *Fleming v. Grafton*, 54 Id. 89; *McCabmont v. Lawrence*, 1 Blotchf. 232; *Hagan v. Walker*, 14 How. 29; *Montgomery v. McGee*, 7 Humph. 234.

When a specific lien exists by judgment, or has been acquired by the levy of execution upon land fraudulently conveyed, equity will not require the judgment creditor to proceed at law with the sale of a doubtful title, but will interfere to set aside the fraudulent conveyance, and will remove the impediments to the sale of the property under execution at its fair valuation: *Dargan v. Waring*, 46 Am. Dec. 234; *Dunham v. Cox*, 64 Id. 480; *Cook v. Johnson*, 72 Id. 381; *Vasser v. Henderson*, 40 Miss. 519; S. C., *post*, p. 351; *Partee v. Matthews*, 53 Id. 146; *Fleming v. Grafton*, 54 Id. 89; *Sheafe v. Sheafe*, 40 N. H. 516. In the case of *Bassett v. St. Albans etc. Co.*, 47 Vt. 313, it is held that the judgment creditor must first levy his execution upon the land before he can resort to chancery to have the conveyance declared fraudulent and void as to him. The doctrine may be considered as fully settled in New York that the return of execution unsatisfied in whole or in part is essential to give the court jurisdiction to remove a fraudulent conveyance of real estate unless the action is brought in aid of an execution then outstanding: *Adair v. Butler*, 67 N. Y. 585, and cases cited. See also *Lewis v. Lanphere*, 79 Ill. 187; *Howe v. Whitney*, 66 Me. 17; *Bigelow Blue Stone Co. v. Magee*, 27 N. J. Eq. 392.

It is not in all cases essential that judgment should be obtained before filing a creditor's bill. It has been frequently held that an attaching creditor, since he has a specific lien by virtue of the attachment levy, may, before judgment, maintain a creditor's suit against an insolvent debtor to set aside a fraudulent transfer: *Heyneman v. Dannenberg*, 65 Am. Dec. 519; *Convey v.*

Woods, 73 Id. 606; *Brichenstaff v. Doub*, 79 Id. 204. *Rinckey v. Stryker*, 84 Id. 324, 329, note, and cases cited; *Joseph v. McGill*, 82 Iowa, 128; *Merriam v. Sewall*, 8 Gray, 316; *Falconer v. Freeman*, 4 Sand. Ch. 565; *Dodge v. Griswold*, 8 N. H. 425; *Sheafe v. Sheafe*, 40 Id. 516; *Hunt v. Field*, 9 N. J. Eq. 36; *Williams v. Michenor*, 11 Id. 520; *Curry v. Glass*, 25 Id. 108. Yet other cases hold the contrary doctrine: *Brooks v. Stone*, 19 How. Fr. 395; *Weil v. Lankins*, 3 Neb. 384; *Fennent v. Battey*, 18 Kan. 324; *Martin v. Michael*, 66 Am. Dec. 656; *Greenleaf v. Mumford*, 19 Abb. Fr. 469; *Mills v. Block*, 30 Barb. 549; *Melville v. Brown*, 16 N. J. L. 364; *Thurber v. Blanck*, 50 N. Y. 80. It seems that an attaching creditor cannot before judgment assail a fraudulent conveyance of land: *McMinn v. Whelan*, 27 Cal. 300.

The rights of creditors at large are not invariably determined by the rule above presented. In the case of *Merchants' National Bank v. Paine*, 13 R. I. 592, many cases are cited and reviewed, and it is held that the reason of the rule requiring the exhaustion of legal remedies before the filing of a creditor's bill has no application where legal process is impossible, and that such bill will lie in favor of a creditor at large against an absconding or non-resident debtor, when no assets can be reached by attachment or execution. To the same effect are the cases of *Pendleton v. Perkins*, 49 Mo. 565; *Peay v. Morrison*, 10 Gratt. 149; *Pope v. Solomon*, 36 Ga. 541; *Scott v. McMullen*, 13 Am. Dec. 239; *Chautauque Co. Bank v. White*, 57 Id. 452, note, and cases cited. Another exception arises where the debtor is dead: *Unknown Heirs v. Kimball*, 58 Id. 638; *Brittain v. Quiet*, 62 Id. 204; *Johnson v. Jones*, 79 Ind. 141; *Merchants' National Bank v. Paine*, 13 R. I. 594, and cases cited. But in New York the death of the debtor is held to constitute no exception, upon the ground that the reason of the rule requiring judgment before a creditor's bill can be filed does not fail on account of the death of the debtor before judgment, since the suit may be prosecuted to judgment against his personal representatives: *Estes v. Wilcox*, 67 N. Y. 264. Yet in the case of *Hagan v. Walker*, 14 How. 32, it is held that the jurisdiction of equity to administer the assets of a deceased debtor, and remove fraudulent transfers by the decedent, at the suit of a simple creditor, is a branch of its original jurisdiction, and is not merely ancillary to the enforcement of an execution at law. See also *Pharis v. Leachman*, 20 Ala. 662; *Haston v. Castner*, 29 N. J. Eq. 536; *Shurts v. Howell*, 30 Id. 418; *Reed v. Speake*, 4 S. C. 293; *Penn. R. R. Co. v. Weiss*, 87 Pa. St. 449; *Wright v. Campbell*, 27 Ark. 637; *Johnson v. Waters*, 111 U. S. 640; *Carter v. Hampton*, 77 Va. 631. By special statutes of Alabama, Maryland, Massachusetts, Mississippi, Tennessee, Virginia, and West Virginia, a creditor at large without judgment at law may, in those states, file a creditor's bill in equity to set aside a fraudulent transfer. In cases of trust, as where it is sought to prevent a trustee for the benefit of creditors from abusing his trust, or to enforce the trust, and reach property held thereunder for the creditors, they may sue in equity without first having obtained judgment at law: *Miller v. Davidson*, 44 Am. Dec. 715; *Kempton v. Hollowell*, 71 Id. 112; *Conro v. Port Henry Iron Co.*, 12 Barb. 58; *Baker v. Bartol*, 6 Cal. 486; *Fairbanks v. Belknap*, 135 Mass. 179.

2. *Who may Bring Bill, and Parties thereto.* — There can be no question as to the right of judgment creditors themselves, in a proper case, to maintain a creditor's bill. But the authorities conflict as to whether an executor or administrator who, by his official position, represents both the creditors and the deceased debtor can maintain a bill to set aside a conveyance which was fraudulent as to creditors. In some decisions it is held that he cannot, upon the ground that he stands in the shoes of the debtor: *Snodgrass v. Andrews*,

64 Am. Dec. 169; *George v. Williams*, 72 Id. 203; *Blake v. Blake*, 53 Miss. 193; *Merry v. Fremont*, 44 Mo. 522; *Davis v. Swanson*, 54 Ala. 277. But the weight of authority and reason is in favor of the right of an executor or administrator, as the representative of the creditors, to sue for property fraudulently alienated by the deceased in his lifetime; and in many states such action is made obligatory by statute: *Ewing v. Handley*, 14 Am. Dec. 157, note, and cases cited; *Hills v. Sherwood*, 48 Cal. 392; *Ford v. Exempt Fire Co.*, 50 Id. 299; *Parker v. Flagg*, 127 Mass. 30; *Bushnell v. Bushnell*, 88 Ind. 403; *German Bank v. Laysor*, 50 Wis. 258. A somewhat similar conflict exists as to whether a voluntary assignee of the debtor for the benefit of creditors may maintain such a bill. The following cases deny his right so to do: *Pillsbury v. Kington*, 31 N. J. Eq. 619; *Brownell v. Curtis*, 10 Paige, 210; *Storm v. Davenport*, 1 Sand. Ch. 135; *Sere v. Pitot*, 6 Oranch, 332; *Estabrook v. Messersmith*, 18 Wis. 545; *Brooming v. Hart*, 6 Barb. 91; *Flower v. Cornish*, 25 Minn. 473. On the other hand, some cases hold that a voluntary assignee for the benefit of creditors may avoid in equity a conveyance made by the debtor in fraud of his creditors: *Spring v. Short*, 90 N. Y. 538; *Waters v. Dashiell*, 1 Md. 455; *Simpson v. Warren*, 55 Me. 18; *Shipman v. Aetna Ins. Co.*, 29 Conn. 245; *Staton v. Pittman*, 11 Gratt. 99; *Doyle v. Peckham*, 9 R. I. 21; *Yams v. Bullit*, 35 Pa. St. 308; *Kilbourne v. Fay*, 25 Ohio St. 549. In some states, the power of such an assignee to sue to set aside a fraudulent conveyance by the debtor is statutory. That such suit may be maintained by an assignee officially appointed in bankruptcy or insolvency proceedings seems not to be questioned: *Pillsbury v. Kington*, 31 N. J. Eq. 620, and cases cited; *Day v. Cooley*, 118 Mass. 527, and cases cited; *In re Simson Leland*, 10 Blatchf. 503; *In re Lowe*, 19 Fed. Rep. 589. The receiver of a debtor may impeach fraudulent transfers: *Osgood v. Laytin*, 48 Barb. 463; *Hamlin v. Wright*, 23 Wis. 492; *Porter v. Williams*, 9 N. Y. 142; *Boatwick v. Menck*, 40 Id. 384; *Underwood v. Sutcliffe*, 77 Id. 469; *Miller v. McKennie*, 29 N. J. Eq. 292.

Creditors by several judgments may join as complainants in a creditor's bill against the same debtor, since they have a common interest in obtaining the relief sought: *Edmeston v. Lyde*, 19 Am. Dec. 454; *Murray v. Hay*, 43 Id. 773; *Williams v. Neel*, 73 Id. 94; *Buckingham v. Walker*, 51 Miss. 494; *Brown v. Pinock*, 10 Ala. 432; *Clarkson v. De Poyeter*, 3 Paige, 320; *Wakeman v. Grover*, 4 Id. 23; *Lenthilhon v. Moffatt*, 1 Edw. Ch. 451; *Morton v. Well*, 33 Barb. 30; *Simar v. Canaday*, 53 N. Y. 305; *Conro v. Port Henry Iron Co.*, 12 Barb. 27; *Sage v. Mosher*, 23 Id. 287; *Dewey v. Moyer*, 72 N. Y. 74; *Chapman v. Banker and Tradesman Pub. Co.*, 128 Mass. 478; *North v. Bradway*, 9 Minn. 183; *Banknight v. Sloan*, 17 Fla. 286; *Gates v. Boomer*, 17 Wis. 455; *Wall v. Fairley*, 73 N. C. 444; *Robbins v. Sand Creek Turnpike Co.*, 34 Ind. 461; *Reed v. Stryker*, 4 Abb. App. 26; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139. One creditor may sue on behalf of all others in the same situation: *Edmeston v. Lyde*, 19 Am. Dec. 454. Other creditors may be permitted to come in and make themselves parties at any time before distribution of assets: *Ex parte Naylor and Smith*, 78 Id. 457; *Brooks v. Gibbons*, 4 Paige, 374; *Myers v. Fenn*, 5 Wall. 207; *Martin v. Tidwell*, 36 Ga. 332; *Strobe v. McDonald*, 2 Har. & G. 191; *Bank v. Dugan*, 2 Bland, 254; *Shubrick v. Shubrick*, 1 McCord, 406. But equity will not save creditors who come in after suit brought from the consequences of lapse of time upon their rights: *Ex parte Naylor and Smith*, 78 Am. Dec. 457. Nor will a creditor who comes in after a decree annulling a fraudulent preference be entitled to share equally with the original complainant: *Smith v. Craft*, 11 Biss. 340. Creditors may join in suit with a sheriff, or with an assignee in bankruptcy: *Adams v. Davidson*, 10 N. Y. 309; *Boone*

v. *Hall*, 7 Bush, 66. A single creditor may file a bill to reach legal assets, but should join other creditors when the object of the suit is to reach equitable assets: *Elmore v. Spear*, 27 Ga. 193; *Rountree v. McKay*, 6 Jones Eq. 87.

The judgment debtor is ordinarily a necessary party defendant: *Lawrence v. Bank*, 35 N. Y. 320; *Beardsley S. Co. v. Foster*, 36 Id. 561; *Miller v. Hall*, 70 Id. 252; *Shaver v. Brainard*, 29 Barb. 25; *Gaylord v. Kelshaw*, 1 Wall. 95; *Lovejoy v. Irelan*, 79 Am. Dec. 667; *Sewall v. Russell*, 2 Paige, 175; as also the executor or administrator of a deceased debtor: *Allen v. Vestal*, 60 Ind. 245; *Boggs v. McCoy*, 15 W. Va. 344; *Alexander v. Quigley*, 2 Duvall, 400; *Postlewait v. Howes*, 3 Iowa, 366; *Pharis v. Leachman*, 20 Ala. 662; *Bachman v. Sepulveda*, 39 Cal. 688; *McDonnell v. Cochran*, 11 Ill. 31; *Cobb v. Norwood*, 11 Tex. 556; the heirs of a deceased vendor of real estate: *McNab v. Heald*, 41 Ill. 326; *Gary v. May*, 16 Ohio, 66; *Sexton v. Crockett*, 23 Gratt. 857; and all grantees or lien-holders who claim an interest in or lien upon the property sought to be charged: *Sage v. Mosher*, 28 Barb. 287; *Gray v. Schenck*, 4 N. Y. 460; *Ward v. Hollins*, 14 Md. 158; *Tichenor v. Allen*, 13 Gratt. 15; *Sexton v. Crockett*, 23 Id. 857; *Hoffman v. Shields*, 4 W. Va. 490; *Boven v. Gent*, 54 Md. 555. Co-judgment debtors should be joined: *Thomas v. Adams*, 30 Ill. 37; *Bennet v. McGuire*, 58 Barb. 625; *Commercial Bank v. Meach*, 7 Paige, 449; *Child v. Brace*, 4 Id. 309; *Harrison v. Hallum*, 5 Cold. 525. Distinct fraudulent grantees of the judgment debtor may be joined as defendants without rendering the bill multifarious: *Williams v. Neel*, 73 Am. Dec. 94; *Delafield v. Anderson*, 15 Miss. 630; *Chase v. Searls*, 45 N. H. 519; *Boyd v. Hoyt*, 5 Paige, 65; *Morton v. Weil*, 33 Barb. 30; *Trego v. Skinner*, 42 Md. 432; *Dimmock v. Bibby*, 20 Pick. 368; *Harrison v. Hallum*, 5 Cold. 525; *Morton v. Weil*, 33 Barb. 30; *Hamlin v. Wright*, 23 Wis. 491; *Pierson v. David*, 1 Iowa, 23; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Reed v. Stryker*, 4 Abb. App. 26; *North v. Bradway*, 9 Minn. 183; *Fellows v. Fellows*, 4 Cow. 682; *Hammond v. H. R. I. & M. Co.*, 20 Barb. 378; *DeWolf v. Sprague Mfg. Co.*, 49 Conn. 282; *Chase v. Redding*, 13 Gray, 418; *Welsh v. Welsh*, 105 Mass. 229; *Gilman v. Hutchinson*, 120 Id. 27; *Crawford v. Kirtsey*, 50 Ala. 591; *Donnovan v. Dunning*, 69 Mo. 436. All parties to the fraudulent and unlawful acts of the debtor may be joined as defendants, their participation in the fraud being a sufficient bond of connection to justify the joinder: *Hammond v. Hudson River Iron and Machine Co.*, 20 Barb. 378; *Brady v. McCosker*, 1 N. Y. 214. In a creditor's suit to enforce an assignment for the benefit of creditors, the assignor and all other creditors must be made parties: *McPherson v. Parker*, 30 Cal. 455.

When the sole object of the suit is to reach property which has been fraudulently transferred by the judgment debtor, and in which he has retained no legal or equitable interest, it has been held that the judgment debtor is not a necessary party to the suit: *Potter v. Phillips*, 44 Iowa, 357; *Campbell v. Jones*, 25 Minn. 155; *Jackman v. Robinson*, 64 Mo. 289; *Buffington v. Harvey*, 95 U. S. 103; *Taylor v. Webb*, 54 Miss. 36, and cases cited; nor need the executor or administrator of a deceased debtor be joined in such case: *Dockray v. Mason*, 48 Me. 178; *Merry v. Fremont*, 44 Mo. 518; *Cornell v. Rodway*, 22 Wis. 260; *Jackman v. Robinson*, 64 Mo. 289, 318; *Zoll v. Soper*, 75 Id. 462; nor the distributees of his estate: *Watts v. Gayle*, 20 Ala. 817. When the interest of an heir is sought to be reached, the administrator need not be joined: *McArthur v. Hoyeradt*, 11 Paige, 495. When the debtor retains an interest in property which he has transferred, such interest may be reached without making the assignee a party: *Edmeston v. Lyde*, 19 Am. Dec. 454. When the rights of a lien-holder cannot be disturbed by the decree, and as

ruling is asked against the lien, such lien-holder may be omitted: *Trego v. Skinner*, 42 Md. 431; *Hagan v. Walker*, 14 How. 29. In a suit to set aside a fraudulent assignment for the benefit of creditors, the creditors provided for in the assignment are not required to be joined: *Therasson v. Hickok*, 37 Vt. 454; *Grover v. Wakeman*, 25 Am. Dec. 624; *Iruin v. Keen*, 3 Whart. 347; *McPherson v. Parker*, 30 Cal. 455. Fraudulent grantees who have parted with their interest may also be omitted: *Jackman v. Robinson*, 64 Mo. 289; *Stout v. Stout*, 77 Ind. 537; *Walker v. Richl*, 38 Md. 211. The debtor of the judgment debtor need not be joined in a creditor's suit to obtain a lien upon the debt: *Adams v. Hackett*, 7 Cal. 203, and cases cited. When a firm debt is sought to be enforced against a fraudulent grantee of individual property of one partner, his copartner is not a proper party if no relief is sought against him: *Randolph v. Daly*, 16 N. J. Eq. 315.

3. *Object of Creditor's Suit, and What Property may be Reached.* — A creditor's suit in equity may be employed in aid of execution, either to make discovery of concealed property of the judgment debtor, or to remove fraudulent conveyances and hindrances to execution, or to reach equitable assets which cannot be subjected to execution at law. The chancery jurisdiction over bills of discovery is entertained in cases where the object of a creditor's bill is to reach concealed assets of the debtor, and to compel their application to the payment of plaintiff's judgment: *Conro v. Port Henry Iron Co.*, 12 Barb. 581; *Hadden v. Spader*, 20 Johns. 554; *Le Roy v. Rogers*, 3 Paige, 234; *Hendricks v. Robinson*, 2 Johns. Ch. 283; *Kimberly v. Sells*, 3 Id. 467; *Thomas v. Adams*, 30 Ill. 37; *Gordon v. Lowell*, 21 Me. 251; *Oadwallader v. G. & A. Soc.*, 11 Ohio, 292; *Hacker v. Robinson*, 8 R. I. 141; *Goss v. Lester*, 1 Wis. 51. Perhaps the most frequent purpose subserved by creditors' bills is to reach property which has been fraudulently transferred or encumbered by the debtor with the intent to defeat his creditors. Most of the cases above cited are of this nature. See also *Bullitt v. Taylor*, 69 Am. Dec. 42; *Folkes v. Hayden*, 29 Miss. 123; *Abbey v. Comm. Bank*, 31 Miss. 434; *Coon v. Henry*, 49 Mich. 208; *Holt v. Bancroft*, 30 Ala. 193; *Watts v. Gale*, 20 Id. 817; *Waddel v. Lunsier*, 62 Id. 347; *Mogut v. Ingham*, 7 Dana, 495; *Trask v. Greene*, 9 Mich. 358; *Gates v. Boomer*, 17 Wis. 455; *Sheafe v. Sheafe*, 40 N. H. 516; *Cooke v. Johnson*, 12 N. J. Eq. 52; *Hamlen v. McGillicuddy*, 62 Me. 269; *Swift v. Arents*, 4 Cal. 390; *Hille v. Sherwood*, 48 Id. 386; *Beach v. Hodgdon*, 66 Id. 187; *Musselman v. Kent*, 33 Ind. 452; *Bottomf v. Covert*, 90 Ind. 508; *Gormley v. Potter*, 29 Ohio St. 599; *Furnace Co. v. Peters*, 40 Id. 575; *Fowler's Appeal*, 87 Pa. St. 454. Such a bill, however, will not be entertained if its real object is to aid the fraudulent debtor in regaining control of his property: *Ruckman v. Conover*, 37 N. J. Eq. 443. The creditor's bill is also frequently employed to reach the equitable interests of the debtor which the arm of the law is powerless to subject to the payment of his debts: *Rice v. Burnett*, 42 Am. Dec. 336; *Dargan v. Waring*, 46 Id. 234; *Heath v. Bishop*, 55 Id. 654; *Long v. Brown*, 56 Id. 244; *Mackason's Appeal*, 82 Id. 517; *Fox v. Moyer*, 54 N. Y. 128; *Williams v. Thorn*, 70 Id. 270; *Smith v. Moore*, 37 Ala. 327; *Halestead v. Dawson*, 10 N. J. Eq. 290; *Sparhawk v. Clan*, 125 Mass. 266; *Graff v. Bonnet*, 31 N. Y. 9; *Hadden v. Spader*, 20 Johns. 554; *Conro v. Port Henry Iron Co.*, 12 Barb. 58; *Love v. Graham*, 25 Ala. 187; *Smith v. Parker*, 41 Me. 452; *Nichols v. Levy*, 5 Wall. 433; *Roberts v. Hodges*, 16 N. J. Eq. 299; *Dorsey v. Dorsey*, 10 Md. 466; *Myers v. Amey*, 21 Id. 302; *State v. McCann*, 24 How. 498; *Pratt v. St. Clair*, 6 Ohio, 227; *Hopkins v. Carey*, 23 Miss. 54; *Atkey v. Knotts*, 6 B. Mon. 24; *Kirby v. Bruns*, 45 Mo. 234; *Le Roy v. Rogers*, 3 Paige, 234. A bill will lie for the double purpose of aiding an

execution and to reach property not open to execution: *Beam v. Bennett*, 51 Mich. 148; *Way v. Bragaw*, 84 Am. Dec. 147.

Under the statutes of some of the states, proceedings supplementary to execution are provided for, the design of which is to accomplish some of the objects of a creditor's bill, and to make such proceedings, to the extent of their design, a substitute for a creditor's suit: *Spencer v. Cayles*, 9 Abb. Pr. 382; *Driggs v. Williams*, 15 Id. 477; *People v. Mead*, 29 How. Pr. 360; *Pope v. Cole*, 64 Barb. 409; S. C., 55 N. Y. 124; *Lynch v. Johnson*, 48 Id. 33; *Becker v. Torrance*, 31 Id. 631; *Barnes v. Morgan*, 3 Hun, 703; *Barker v. Dayton*, 28 Wis. 367; *Adams v. Hackett*, 7 Cal. 187; *McOullough v. Clark*, 41 Id. 298; *Pacific Bank v. Robinson*, 57 Id. 520. Such proceedings usually afford a more expeditious and appropriate remedy to reach the concealed legal assets of the debtor than the bill of discovery in chancery, and may be so far considered as practically an exclusive remedy. But statutory proceedings supplementary to execution are not exclusive of the jurisdiction of equity over creditors' bills to remove fraudulent transfers and to reach equitable assets: *Williams v. Sexton*, 19 Wis. 42; *Swift v. Arents*, 4 Cal. 390; *Burt v. Hoettinger*, 28 Ind. 217; *Bennet v. McGuire*, 58 Barb. 625; *Pope v. Cole*, 64 Id. 406; *Taylor v. Perse*, 15 How. Pr. 417; *Taft v. Wright*, 47 Id. 1; *Goodyear v. Betts*, 7 Id. 187; *McKethan v. Walker*, 66 N. C. 95; *Abbey v. Commercial Bank*, 31 Miss. 434.

Every species of property, legal or equitable, may be reached and sold under the decree in a creditor's suit: *Edmeston v. Lyde*, 19 Am. Dec. 454. But it is doubtful whether choses in action, as such, can be reached by a creditor's bill merely because fraudulently transferred, unless the case is otherwise of equitable jurisdiction: *Donovan v. Finn*, 14 Id. 531, note, and cases cited. The following cases, however, hold that choses in action may be reached: *Edmeston v. Lyde*, *supra*; *Drake v. Rice*, 130 Mass. 410; *Pendleton v. Perkins*, 49 Mo. 565; *Powell v. Howell*, 63 N. C. 283; *Bayard v. Hoffman*, 4 Johns. Ch. 450; *Stinson v. Williams*, 35 Ga. 170; *Rogers v. Jones*, 1 Neb. 417; *Abbott v. Tenney*, 19 N. H. 109; *Sargent v. Salmond*, 27 Mo. 539; *City of Newark v. Funk*, 15 Ohio St. 462; *Hitt v. Ormebee*, 14 Ill. 233; *Long v. Page*, 10 Humph. 541; *Tantum v. Green*, 21 N. J. Eq. 364. Moneys earned may be reached, though not due: *Thompson v. Nixon*, 3 Edw. Ch. 457; *Browning v. Bettis*, 8 Paige, 568. Stocks may be reached: *Edmeston v. Lyde*, *supra*; *Bayard v. Hoffman*, *supra*; *Weed v. Pierce*, 9 Cow. 723; as also annuities: *Norcutt v. Dodd*, 1 Craig & P. 100; life-insurance policies: *Burton v. Fuinsholt*, 86 N. C. 260; *Anthracite Ins. Co. v. Sears*, 100 Mass. 383; trade-marks: *Warren v. Warren Thread Co.*, 134 Id. 247; book royalties: *Lord v. Harte*, 118 Id. 271; patent rights: *Barnes v. Morgan*, 3 Hun, 704; *Gillet v. Bate*, 86 N. Y. 87; *Ager v. Murray*, 105 U. S. 126; *Stephens v. Cady*, 14 How. 531; license under a patent right: *Mattheos v. Green*, 19 Fed. Rep. 649; and legacies: *Bigelow v. Ayrault*, 46 Barb. 143. Property upon which a lien is given to a surety to indemnify him against the debt may be reached to the extent of the indemnity: *New London Bank v. Lee*, 27 Am. Dec. 713; *King v. Harman's Heirs*, 26 Id. 485. A mere permissive occupancy or bare possibility cannot be reached: *Waggoner v. Speck*, 3 Ohio, 293; *Gentry v. Harper*, 2 Jones Eq. 177; *Smith v. Kearney*, 2 Barb. Ch. 533. The moral obligation of executors under a will cannot be enforced by creditors: *Sparks v. De la Guerra*, 18 Cal. 676. But property appointed by executors under a will may be reached as assets of the appointee: *Mackason's Appeal*, 82 Am. Dec. 517; *Johnson v. Cushing*, 41 Id. 694; *Clapp v. Ingraham*, 126 Mass. 209; *Commonwealth v. Duffield*, 12 Pa. St. 277; *Tallmadge v. Sill*, 21 Barb. 51.

The interest of an heir or distributee in the hands of an executor may be reached: *Donovan v. Finn*, 14 Am. Dec. 531, note, and cases cited; *Lang v. Brown*, 56 Id. 244; *Shannon v. Dillon*, 48 Id. 234; *Caldwell v. Montgomery*, 8 Ga. 106; as also an unassigned right of dower: *Payne v. Becker*, 87 N. Y. 157; *Stewart v. McMartin*, 5 Barb. 438; *Tomkins v. Fonda*, 4 Paige, 448; or a tenancy by curtesy: *Hillworth v. Cook*, 8 Id. 643. Tolls and corporate franchises may be subjected to the payment of debts: *Macon & W. R. R. Co. v. Parker*, 9 Ga. 377; *Covington D. Co. v. Shepherd*, 21 How. 112. The creditors of an insolvent corporation may sue in equity to compel the stockholders to pay up the stock subscribed: *Henry v. F. & A. R. R. Co.*, 17 Ohio, 187; *Miers v. Z. & M. T. Co.*, 11 Id. 273; S. C., 13 Id. 197; *Harman v. Page*, 62 Cal. 448.

Since property exempt from execution cannot be subjected to the payment of debts by any proceedings at law, it follows that no fraud can be committed upon the rights of creditors by any transfer of such property, and a court of equity is equally powerless with a court of law to reach it or to subject it to the claims of creditors: *Wood v. Chambers*, 70 Am. Dec. 382; *Sears v. Hanks*, 64 Id. 378; *Smilie v. Quinn*, 25 Hun, 332; S. C., 90 N. Y. 493; *Cooney v. Cooney*, 65 Barb. 524; *Boggs v. Thompson*, 13 Neb. 403; *Morrison v. Abbott*, 27 Minn. 116; *Hudson v. Plets*, 11 Paige, 180; *Andrews v. Rowan*, 28 How. Pr. 126; *O'Connor v. Ward*, 60 Miss. 1037; *Prens v. Hewitt*, 55 Vt. 363; *Pike v. Mills*, 23 Wis. 164; *Winchester v. Gaddy*, 72 N. C. 115; *Finnin v. Maloy*, 1 Jones & S. 382; *Carhart v. Horshaw*, 45 Wis. 340; *Tracey v. Cover*, 28 Ohio St. 61; *Washburn v. Goodheart*, 88 Ill. 229.

A creditor may proceed in one suit to set aside fraudulent transfers of both real and personal property, and need not first exhaust the personalty: *Snodgrass v. Andrews*, 64 Am. Dec. 169. If a fraudulent vendee has sold goods exceeding the amount of the creditor's claim, personal judgment may be rendered against him: *Swinford v. Rogers*, 23 Cal. 236, and cases cited.

4. *Creditor's Bill as Lien, and Priority of Right.*—In general, where no specific lien has been acquired upon the property before suit, the filing of a creditor's bill in equity to reach personal assets of the debtor will operate as a specific lien in the nature of an attachment or equitable levy upon the property sought to be charged, and will confer priority of right to payment out of the proceeds as against other creditors or purchasers *pendente lite*: *Scott v. McMillen*, 13 Am. Dec. 239; *Beck v. Burdett*, 19 Id. 436; *Haleys v. Williams*, 19 Id. 743; *Corning v. White*, 22 Id. 659, note, and cases cited; *Edenston v. Lyde*, 19 Id. 234; *Dargan v. Waring*, 46 Id. 234; *George v. Williamson*, 72 Id. 203; *Bank of United States v. Burke*, 4 Blackf. 145; *Lynch v. Johnson*, 48 N. Y. 33; *Storm v. Waddell*, 4 Johns. Ch. 494; *Weed v. Smull*, 3 Sand. Ch. 494; *Bayard v. Hoffman*, 4 Johns. Ch. 450; *McDermott v. Strong*, 4 Id. 687; *Twiford v. Burnham*, 7 Dana, 110; *Newdigate v. Lee*, 9 Id. 20; *Miller v. Sherry*, 2 Wall. 249; *Chittenden v. Brewster*, 2 Id. 238; *Jeffries v. Cochran*, 47 Barb. 557; S. C., 48 N. Y. 671; *Brown v. Nichols*, 42 Id. 26; *Adsit v. Butler*, 87 Id. 587; *Deposit National Bank v. Wickham*, 44 How. Pr. 422; *Burt v. Keyes*, 1 Flip. 72; *Miers v. Z. etc. T. Co.*, 13 Ohio, 197; *Stanton v. Keyes*, 14 Ohio St. 443; *Clarkson v. De Peyster*, 3 Paige, 320; *Utica Ins. Co. v. Power*, 3 Id. 365; *Bloodgood v. Clark*, 4 Id. 474; *Ames v. Blunt*, 5 Id. 13; *Burrell v. Leslie*, 6 Id. 445; *Fitch v. Smith*, 10 Id. 9; *Farnham v. Campbell*, 10 Id. 598; *Weed v. Pierce*, 9 Cow. 722; *Hone v. Henriques*, 27 Am. Dec. 204; *Boydton v. Basdon*, 1 Clarke Ch. 584; *Bridgman v. McKisick*, 15 Iowa, 260; *Gordon v. Lowell*, 21 Ma. 251; *Lyon v. Robbins*, 46 Ill. 276; *Watkins v. Pinkney*, 3 Edw. Ch. 533; *Carr v. Fearington*, 63 N. C. 560; *Wooten v. Clark*, 23 Miss.

75; *Baker v. Bartol*, 6 Cal. 486. But where there is a prior specific lien by judgment or levy under process, a creditor's suit cannot give priority over it: *Chautauque Co. Bank v. Risley*, 75 Am. Dec. 347; *Scouten v. Bender*, 3 How. Pr. 185. Of two creditors having liens, the prior lien will be preferred: *Trimple v. Turner*, 53 Am. Dec. 90. In general, judgment creditors can only reach the real estate of the debtor in the order of the dates of their judgments: *Haleys v. Williams*, 19 Id. 743, and cases cited; *Birely's Ex'rs v. Staley*, 25 Id. 303; *Gracey v. Davis*, 51 Id. 663. A judgment creditor of an insolvent corporation, under the laws of New York, obtains no preference by filing a creditor's bill: *Morgan v. New York R. R. Co.*, 40 Id. 244. Equity carries along the lien of a judgment against an equitable estate: *Unknown Heirs v. Kimball*, 58 Id. 638. Each judgment is a lien upon property fraudulently conveyed by the debtor: *Dunham v. Cox*, 64 Id. 460. But it has been held to be the better opinion that the judgment creditor who first files his bill to set aside a fraudulent conveyance of real estate has priority: *George v. Williamson*, 72 Id. 203; *Petway v. Hoskins*, 12 Lea, 107. A judgment creditor, by resorting to a creditor's bill, cannot affect the rights of an execution purchaser of real estate fraudulently conveyed, if it is sold under a prior judgment: *Chautauque Co. Bank v. Risley*, 75 Am. Dec. 347, note, and cases cited; *Scouten v. Bender*, 3 How. Pr. 185. The priority of a judgment creditor may be lost by neglect to sue out execution, as against a more vigilant judgment creditor who files a bill in equity: *Dargan v. Waring*, 46 Am. Dec. 234; *Dunham v. Cox*, 64 Id. 460.

No lien can be acquired by a creditor's bill, except when the creditors cannot acquire a lien at law: *Hubbe v. Bancroft*, 4 Ind. 388. When a levy and sale is made under execution at law, it will take precedence over a prior creditor's bill if the property had not first vested in a receiver appointed in the creditor's suit: *Bowry v. Odell*, 4 Ohio St. 623; *Lansing v. Whitbeck*, 7 Paige, 364; *Storm v. Badger*, 8 Id. 130; *Mann v. Penta*, 2 Sand. Ch. 257; *Storm v. Waddell*, 2 Id. 494; *Van Alstyne v. Cook*, 25 N. Y. 439; *Becker v. Torrance*, 31 Id. 631; *Davenport v. Kelly*, 42 Id. 193, 257. A creditor at large, without judgment or specific lien, when permitted in an exceptional case to maintain a creditor's suit, cannot thereby acquire any lien, or priority over other creditors: *Robinson v. Stewart*, 10 Id. 196; *Day v. Washburn*, 24 How. 355; *Barton v. Bryant*, 2 Ind. 189; *McNaughton v. Lamb*, 2 Id. 642.

5. *Injunction and Receiver in Creditor's Suit.*—In order to make the suit effectual, equity will employ the ancillary remedies of injunction and the appointment of a receiver. An injunction will be granted to prevent waste, or to restrain a fraudulent conversion or disposition of the property with a view to thwart the creditors' proceedings: *Wilmer's Appeal*, 84 Am. Dec. 505; *Tessier v. Wise*, 3 Bland, 29; *Appeal of Fowler*, 87 Pa. St. 449; *Bloodgood v. Clark*, 4 Paige, 574; *Austin v. Figueira*, 7 Id. 56; *New v. Baine*, 10 Id. 502. The courts will not ordinarily interfere, either by injunction or receiver, at the instance of a creditor at large, who is in no condition while his rights remain undetermined at law to call upon a court of equity to restrain the control or alienation of the debtor's property, or to seize his assets: *Uhl v. Dillon*, 69 Am. Dec. 172; *Allen v. Center Valley Co.*, 44 Id. 333; *McGoldrick v. Slevin*, 43 Ind. 522; *Peyton v. Lamar*, 42 Ga. 134; *Shufelt v. Boehm*, 96 Ill. 560; *Phelps v. Foster*, 18 Id. 309; *Adler v. Fenton*, 24 How. 411; *Wiggins v. Armstrong*, 2 Johns. Ch. 145; *Wilcox v. Kellogg*, 11 Ohio, 394; *Sigler v. Knox County Bank*, 8 Ohio St. 511; *Shackelford v. Shackelford*, 32 Gratt. 481; *Schmidlapp v. Currie*, 55 Miss. 597; *Mayer v. Clark*, 40 Ala. 259; *Rich v. Levy*, 16 Md. 74. But in such exceptional instances, as equity will sustain a credi-

tor's bill in favor of a creditor at large, it will also grant the aid of these ancillary remedies: *Haggarty v. Plaman*, 19 Am. Dec. 434; *Mott v. Dunn*, 10 How. Pr. 225; *Sorley v. Brewer*, 18 Id. 276; *Bowen v. Hoskins*, 45 Miss. 163; *Cottrell v. Moody*, 12 B. Mon. 502; *Thompson v. Diffenderfer*, 1 Md. Ch. 489; *Rosenberg v. Moore*, 11 Md. 376; *Hyde v. Ellery*, 18 Id. 501; *Cohen v. Myers*, 42 Ga. 46; *Todd v. Lee*, 15 Wis. 365. No injunction will be issued in a creditor's suit unless a necessity therefor is apparent to save the rights of the creditor: *Portland Building Association v. Creamer*, 34 N. J. Eq. 107.

The appointment of a receiver upon a creditor's bill is a usual practice, and is almost a matter of course, where the object of the bill is to reach personal assets: *Bloodgood v. Clark*, 4 Paige, 577; *Fitzburg v. Everingham*, 6 Id. 29; *Shainwald v. Lewis*, 6 Fed. Rep. 776; *Crippen v. Hudson*, 13 N. Y. 161; *Payne v. Sheldon*, 63 Barb. 169; *Mitchell v. Barnes*, 22 Hun, 194; *Bank of Monroe v. Schermerhorn*, Clarke Ch. 214; *Fuller v. Taylor*, 6 N. J. Eq. 301. Reluctance has been shown to appoint a receiver of real estate in a creditor's suit: *Fause v. Woods*, 46 Miss. 120; but he may be appointed to collect rents: *Compton v. Lee*, 3 Edw. Ch. 304. A receiver will be appointed upon proceedings supplementary to execution to take charge of assets, in like manner as upon a creditor's bill: *Porter v. Williams*, 69 Am. Dec. 519; *Cooney v. Cooney*, 65 Barb. 524; *Bostwick v. Menck*, 40 N. Y. 384; *Moake v. Coates*, 33 Barb. 496; *Hathaway v. Brady*, 26 Cal. 582; *Pacific Bank v. Robinson*, 57 Id. 520. For a discussion as to the appointment and powers of a receiver in a creditor's suit, see *Chautauque Co. Bank v. White*, 57 Am. Dec. 442, 450, note, and cases cited. The mere appointment of a receiver does not effect a transfer of the debtor's property before it is seized, or a transfer in fact made: *Farmers' Bank v. Reaston*, 38 Id. 226; *Chautauque Co. Bank v. Risley*, 75 Id. 347; *Olney v. Tanner*, 10 Fed. Rep. 113; S. C., 18 Id. 636; but it has been held that a receiver's title, when obtained, will relate to the date of his appointment: *Rutter v. Tallis*, 5 Sand. 610; *Steele v. Sturges*, 5 Abb. Pr. 442; yet not so as to defeat an execution levy under a judgment rendered before the appointment: *Artisans' Bank v. Treadwell*, 34 Barb. 553.

6. *Pleading and Evidence in Creditors' Suits.* — A creditor's bill must show by the facts averred that the creditor is embarrassed and injured by the concealment or fraudulent disposition of the debtor's assets which are sought to be reached. His title to the assistance of equity as a judgment creditor who has exhausted his remedy at law must fully appear: *Kenney v. Dow*, 13 Am. Dec. 342; *Dunham v. Cox*, 64 Id. 460; *Lupton v. Lupton*, 3 Cal. 120; *Harrie v. Taylor*, 15 Id. 348; *Randolph v. Daly*, 16 N. J. Eq. 317; *Ekell v. Johnson*, 3 Hun, 559; *Beardsley Scythe Co. v. Foster*, 36 N. Y. 565; *Crippen v. Hudson*, 13 Id. 165; *Adatt v. Sanford*, 23 Hun, 45; *Payne v. Sheldon*, 63 Barb. 176; *Scott v. McFarland*, 34 Miss. 363; *Kirkpatrick v. Means*, 5 Ired. Eq. 220; *Swydam v. Northwestern Ins. Co.*, 51 Pa. St. 394; *Harrison v. Hallam*, 5 Cold. 525; *Barron v. Bailey*, 5 Fla. 9; *Young v. Frier*, 9 N. J. Eq. 465; *Burdeall v. Waggoner*, 4 Col. 261; *Merrell v. Johnson*, 96 Ill. 230; *McCole v. Lochr*, 79 Ind. 431; *Warner v. Dove*, 33 Md. 579; *Lawson v. Grubbs*, 44 Ga. 466; *Albright v. Hersog*, 12 Ill. App. 567. But when execution has been levied upon land fraudulently conveyed by an insolvent debtor, the bill need not allege the insolvency of co-debtors, or that the remedy at law has been exhausted against them, to sustain the jurisdiction of equity to set aside the fraudulent conveyance: *Fasson v. Henderson*, 40 Miss. 519; S. C., *post*, p. 351. When a fraudulent transfer of the debtor's property is complained of, facts showing the fraud must be distinctly and fully averred: *Kenney v. Dow*, 13 Am. Dec. 342; *Dowson v. Finn*, 14 Id. 534, 542, note, and cases cited; *Finnelly v. Crane*, 58 Ala.

627; *Pickett v. Pipkin*, 64 Id. 523; *Rhead v. Housman*, 46 Mich. 246; *Patton v. Taylor*, 7 How. 159; *Small v. Boudinot*, 9 N. J. Eq. 391; *Klein v. Horine*, 47 Ill. 430; *Ontario Bank v. Root*, 3 Paige, 478; *Kinder v. Macy*, 7 Cal. 206; *Skinner v. Stuart*, 15 Abb. Pr. 391. A bill alleging mere fear that the debtor will prefer other creditors, without any facts showing fraud, is insufficient: *McGough v. Ins. Bank of Columbus*, 46 Am. Dec. 382. The bill to be sufficient must show that the removal of the obstruction complained of will enable the judgment of plaintiff to attach upon the property: *Spring v. Short*, 90 N. Y. 538. The claim of plaintiff must appear to have existed at the time of the alienation of the property sought to be charged: *Bruggerman v. Hoerr*, 82 Am. Dec. 97; *Woodridge v. Gage*, 68 Ill. 157; *Merrell v. Johnson*, 96 Id. 230; *Donley v. McKiernan*, 62 Ala. 34; *Walshall v. Rives*, 34 Id. 91; *De Garca v. Galean*, 55 Tex. 53; as also the insolvency of the debtor at that time: *Eve v. Lewis*, 90 Ind. 457. Facts explaining or excusing the delay of the plaintiff must be averred in the bill: *Badger v. Badger*, 2 Wall. 92; *Wood v. Carpenter*, 101 U. S. 140; also such equitable circumstances as may make the case an exception to the rule that execution must be returned *nuda bona* before suit: *Menz v. Anthony*, 52 Am. Dec. 274. The bill, if insufficient to sustain a creditor's suit, may be amended so as to make it sufficient: *Williams v. Noel*, 64 Id. 94; *Baker v. Bartol*, 6 Cal. 486.

The description in the bill of the assets of the debtor may be general, and often must be so, when the object of the bill is to make a discovery of concealed assets. The bill may operate as a general lien upon property generally described so as to lay the foundation for an injunction and receiver, but cannot operate as notice affecting any real estate, unless it is specifically described: *Miller v. Sherry*, 2 Wall. 250; *Griffith v. Griffith*, 9 Paige, 317. An amendment as to the description of real property can only operate to charge it specifically from the time of the service of the amended pleading: *Miller v. Sherry*, 2 Wall. 250.

The defenses permissible in a creditor's suit do not usually include an attack by any defendant upon the judgment obtained in the court of law, which cannot be collaterally assailed for irregularity, or upon any ground except that of fraud or collusion: *Garland v. Rives*, 15 Am. Dec. 756; *Candee v. Lord*, 51 Id. 294, note, and cases cited; *Bank of Wooster v. Stevens*, 59 Id. 619; *Barnard v. Darling*, 1 Barb. Ch. 218; *Storm v. Waddell*, 2 Sand. Ch. 494; *Scott v. Indianapolis Wagon Works*, 48 Ind. 75. Usury upon the debt which has passed to judgment cannot be pleaded as a defense to a creditor's bill: *Bank of Wooster v. Stevens*, 59 Am. Dec. 619. But it may be shown by other creditors, or by transferee of the property of the judgment debtor which is sought to be reached in his hands, that the judgment was fraudulently or collusively obtained, and was not founded upon an actual indebtedness or liability: *King v. Tharp*, 26 Iowa, 283; *Vogt v. Ticknor*, 48 N. H. 247; *Collinson v. Jackson*, 8 Saw. 357; *Clark v. Anthony*, 31 Ark. 549; *Carter v. Bennett*, 4 Fla. 283. When the judgment is subsequent in date to a fraudulent conveyance which it is the object of the suit to set aside, the judgment is not a conclusive determination of the existence and validity of the debt at the time of the conveyance, and that matter may be made a proper subject of inquiry: *Bruggerman v. Hoerr*, 82 Am. Dec. 97; *Dubose v. Young*, 14 Ala. 139.

It is a sufficient answer to a creditor's bill that the debtor has property subject to execution from which the demand may be fully satisfied: *Storm v. Badger*, 8 Paige, 130; *Canaday v. Nuttall*, 2 Ired. Eq. 265; *Wilson v. Dale*, 5 Ind. 163; *Clark v. Strong*, 16 Ohio, 317; *Second Ward Bank v. Uppman*, 13 Wis. 499; *Starr v. Rathbone*, 1 Barb. 70; *Congdon v. Lee*, 3 Edw. Ch. 304;

Parker v. Moore, 3 Id. 234; *Marr v. Southwick*, 2 Port. 351. The debtor may plead a discharge from the judgment by proceedings in bankruptcy: *Scott v. Grant*, 10 Paige, 485; *Stewart v. Isidor*, 5 Abb. Pr., N. S., 68. An answer denying the ownership of any property is a sufficient defense to a bill of discovery against the debtor: *Wendell v. Shaw*, 1 Barb. 462; *Brownell v. Curtis*, 10 Paige, 210.

Fraud averred in the bill must be as specifically and fully denied as it is charged. A positive denial of fraud in general will not prevail against an admission of facts showing the transaction fraudulent: *Robinson v. Stewart*, 10 N. Y. 194; *Cunningham v. Freeborn*, 11 Wend. 253; *Jackson v. Hart*, 11 Id. 349; *Sayre v. Fredericks*, 19 N. J. Eq. 209; *Hoboken Bank v. Beckman*, 33 Id. 53; *Parkman v. Welch*, 19 Pick. 234. A vendee must deny notice of the alleged fraud with fullness and particularity: *Stanton v. Green*, 34 Miss. 592; *Gallatin v. Cunningham*, 8 Cow. 374; *Miller v. Fraley*, 21 Ark. 22; *Manhattan Co. v. Evertson*, 6 Paige, 466. A defendant cannot in defense of his own fraud plead the laches of the plaintiff in suing: *Greenman v. Greenman*, 107 Ill. 404.

The burden of proof rests upon the creditor to show the insolvency of the debtor: *Bishop v. State*, 83 Ind. 67; *Hogan v. Robinson*, 94 Id. 138; as also to show a fraudulent intent, or the absence of consideration in a conveyance which it is the object of the suit to set aside: *Fuller v. Brewster*, 53 Md. 359; *Anderson v. Roberts*, 9 Am. Dec. 235; *Mehlhop v. Pettibone*, 54 Wis. 652; *Tickner v. Winfall*, 9 Ala. 306; *Fifield v. Gaston*, 12 Iowa, 218; *Curtis v. Fox*, 47 N. Y. 299; *Storm v. Kelley*, 88 Id. 421; *Tompkins v. Nichols*, 53 Ala. 197; *Williamson v. Williamson*, 11 Lea, 355; *State v. Keeler*, 49 Mo. 548; *Pussy v. Gardner*, 21 W. Va. 476; *Martel v. Somers*, 26 Tex. 551; *Sellers v. Sellers*, 21 La. Ann. 647; *Chaffé v. Liso*, 34 Id. 310. But where strong doubt of the integrity of a transaction is raised, the burden of explanatory proof is upon the defendant: *Clements v. Moore*, 6 Wall. 315; *Gourdain v. Baylies*, 10 La. Ann. 691; *Purkitt v. Polack*, 17 Cal. 327; *Sears v. Shafer*, 1 Barb. 408; *Atkinson v. Phillips*, 1 Md. Ch. 507; *Ellinger v. Crowl*, 17 Md. 361; *Johnston v. Dick*, 27 Miss. 277; *King v. Atkins*, 33 La. Ann. 1057; *Tredwell v. Graham*, 88 N. C. 208; *Siemon v. Wilson*, 3 Edw. Ch. 36.

The judgment obtained by the plaintiff against the debtor is sufficient evidence to prove the indebtedness as against all the parties to the creditor's suit when it is not impeached for fraud or collusion: *Garland v. Atwee*, 15 Am. Dec. 756; *Candee v. Lord*, 51 Id. 294, note, and cases cited; *Coghill Co. v. Marks*, 29 Cal. 673; *Sezey v. Adkinson*, 34 Id. 351; *Hills v. Sherwood*, 48 Id. 386; *Vogt v. Ticknor*, 48 N. H. 245; *Church v. Chapin*, 35 Vt. 231; *Law v. Payson*, 32 Me. 521; *Olark v. Anthony*, 31 Ark. 546; *Rogers v. Rogers*, 3 Paige, 379. The judgment must be produced in evidence, as well as the execution, to lay the foundation for impeaching a fraudulent conveyance: *Sharp v. Wickliffe*, 14 Am. Dec. 37; *Carlton v. King*, 23 Id. 299, note, and cases cited.

Evidence may be given of similar fraudulent transactions which helped the grantor to baffle creditors if they occurred about the same time, or are so connected with the transaction in question as to reflect light upon it: *Adams v. Kenney*, 59 N. H. 133; *Day v. Stone*, 59 Tex. 612; *Taylor v. Robinson*, 2 Allen, 172; *Lynde v. McGregor*, 13 Id. 172; *Pierce v. Hoffman*, 24 Vt. 525; *Blake v. White*, 13 N. H. 267; *Butler v. Collins*, 12 Cal. 465; *Bancroft & Co. v. Herinck*, 54 Id. 120, and cases cited. But this rule is confined to transactions connected in time or otherwise with the transaction in question, and evidence cannot be received as to remote or disconnected transactions of fraud not in controversy: *Cohn v. Mulford*, 15 Id. 52; *Williams v. Robbins*, 15 Gray, 590; *Sutter v. Lackmann*, 39 Mo. 91; *Olark v. Johnson*, 5 Day, 373; *Staples v. Smith*,

48 Mo. 470; *Huntington v. Harper*, 44 Pa. St. 204. The relations between the parties to the conveyance may be proven in connection with the evidence in support of the charge of fraudulent intent: *Troy v. Smith*, 33 Ala. 469; *Shadbourne v. Amonett*, 7 La. Ann. 89; *Pepper v. Dunlap*, 9 Id. 137; *Demarest v. Terhune*, 18 N. J. Eq. 45; *Strong v. Hines*, 35 Miss. 201; *Gibson v. Hill*, 23 Tex. 77. The acts and declarations of a fraudulent grantor made prior to the conveyance, or while he remained in possession of the property, may be proven if accompanied or followed by proof of knowledge of fraud on the part of the grantee: *Landecker v. Houghtaling*, 7 Cal. 391; *Vieher v. Webster*, 8 Id. 109; *Merrill v. Meachum*, 5 Day, 341; *Hoose v. Robinson*, 18 La. Ann. 648; *Marsh v. Hampton*, 5 Jones, 382. When a fraudulent combination is shown, the admissions of the grantor made after the conveyance are evidence against the grantee: *Hove v. Scannel*, 8 Cal. 325; *Borland v. Mayo*, 8 Ala. 113; *Waterbury v. Sturtevant*, 18 Wend. 353; *McKee v. Gilchrist*, 3 Watts, 230; *Neal v. Peden*, 1 Head, 546. But declarations of the grantor, though made prior to the conveyance, are not evidence against a bona fide purchaser who had no knowledge of the grantor's fraudulent design: *Partelo v. Harris*, 26 Conn. 480; *McElfratrick v. Hicks*, 21 Pa. St. 402; nor can any declarations of the grantor made subsequent to the conveyance and surrender of possession to the grantee be shown in the absence of proof of collusion between them: *Paine v. Griffin*, 7 Blackf. 485; *Childress v. Holland*, 3 Hayw. (Tenn.) 274; *Cohn v. Mulford*, 15 Cal. 50; *Jones v. Morse*, 36 Id. 205; *Spannagel v. Dellinger*, 38 Id. 282; *Garlick v. Bowers*, 66 Id. 122; *Briswalter v. Palomares*, 66 Id. 261. Any declarations of the vendee which tend to connect him with the fraudulent intent, or to show his knowledge of it, are of course admissible against him: *Foster v. Thompson*, 5 Gray, 453; *Gillet v. Phelps*, 12 Wis. 392.

The opinions of witnesses as to the solvency or insolvency of the debtor have been held inadmissible: *Brice v. Lide*, 68 Am. Dec. 148; *Denman v. Campbell*, 7 Hun, 88; *Babcock v. Middlesex etc. Bank*, 28 Conn. 302. But where the opinion rests upon facts testified to, with which it is interwoven as one of the facts, or is itself a substantive fact in issue, it has been held admissible: *Cranford v. Andrews*, 6 Ga. 244; *Royall v. McKensie*, 25 Ala. 363; *Sherman v. Blodgett*, 28 Vt. 149; *Thompson v. Hall*, 45 Barb. 216; *Blanchard v. Mann*, 1 Allen, 433; *Riggins v. Brown*, 12 Ga. 273; *Breckenridge v. Taylor*, 5 Dana, 114. Evidence of the general reputation of the insolvency of the debtor is admissible: *Minninger v. Knox*, 8 Minn. 148; *Griffith v. Parks*, 32 Md. 4; *Bank of Middlebury v. Rutland*, 33 Vt. 414; *Metcalf v. Munson*, 10 Allen, 493; *Lee v. Kilburn*, 3 Gray, 594; *Price v. Masange*, 31 Ala. 701; *Stebbins v. Miller*, 12 Allen, 591. Also of the general financial reputation of all of the parties to an alleged fraudulent conveyance: *Sweetser v. Bates*, 117 Mass. 466; *Cook v. Mason*, 5 Allen, 212. Experts may be called to prove the value of the assigned property: *Bank v. Keavy*, 128 Mass. 303.

VENDOR'S LIEN does not pass to a mere assignee of a note given for the purchase-money of land if the land has been previously conveyed by the vendor without an express reservation of the lien: *Jackman v. Hallock*, 13 Am. Dec. 627; *Briggs v. Hill*, 38 Id. 441; *Hall v. Click*, 39 Id. 327; *Wellborn v. Williams*, 52 Id. 427; *Richards v. Leaming*, 81 Id. 239; *Baum v. Grigsby*, 81 Id. 153, and cases cited; *Mackreth v. Symmons*, 2 Lead. Cas. Eq., note, and cases cited; contra: *Johnson v. Gwathmey*, 14 Am. Dec. 135; *Kern v. Hamelrigg*, 71 Id. 360. The rule is otherwise if the title has been retained by the vendor as security, or if the vendor's lien has been expressly reserved: *Lagoss v. Badollet*, 12 Id. 258; *Schnabley v. Ragan*, 28 Id. 200, note, and cases cited;

Graham v. McCampbell, 33 Id. 126, 130, note, and cases cited; *Hanna v. Wilson*, 46 Id. 190; *Conner v. Banks*, 52 Id. 209; *Moore v. Anders*, 60 Id. 551, 560, note, and cases cited; *Murray v. Able*, 70 Id. 330; *Griffin v. Carnack*, 76 Id. 344; *Baum v. Grigsby*, 81 Id. 153; *Dingley v. Bank of Ventura*, 57 Cal. 467, and cases cited.

THE PRINCIPAL CASE IS CITED in *Tolbert v. Horton*, 31 Minn. 520, to the point that a creditor's bill in equity to reach assets of the debtor cannot be maintained by a creditor at large who has not obtained judgment or exhausted his remedies at law.

LAMBERTON v. WINDOM.

[12 MINNESOTA, 232.]

JUDGMENT UPON PLEADINGS for plaintiff cannot be sustained if the answer, qualified by an offer of proof upon the trial, sets up a defense.

PLEDGE OF NEGOTIABLE PAPER AS COLLATERAL SECURITY IS BOUND TO ORDINARY DILIGENCE to preserve the legal validity and pecuniary value of the pledge, and must take active measures to prevent a loss by insolvency of parties liable upon the collateral note. He is liable to the extent of such loss occasioned through his negligence.

INDORSEMENT AND DELIVERY OF NEGOTIABLE PAPER AS COLLATERAL SECURITY before maturity passes the legal title to the holder, with power to collect by suit or otherwise, subject to the rights of the indorser as to the application of proceeds. The responsibilities of the holder of collateral security are implied by law.

EVIDENCE AS TO ORIGINAL SOLVENCY of the maker of a collateral note is admissible when loss of such note through his insolvency by neglect of the holder is pleaded as a defense to an action upon the note secured.

THE opinion states the facts.

Smith and Gilman, and B. Franklin, for the appellants.

Chatfield and Irwin, for the respondents.

By Court, McMILLAN, J. The complaint avers that on the 4th of September, 1857, the defendants, partners, were indebted to the plaintiffs in the sum of \$370.70; that afterwards, and on that day, the defendants, in consideration of said indebtedness, made their promissory note, bearing date the same day, for \$370.70, payable to the order of H. W. Lamberton, one of the plaintiffs, thirty days after date, with interest at sixty per cent per annum after due; that no part thereof has been paid except twenty-five dollars paid and indorsed thereon on the 5th of October, 1858.

The defendants in their answer admit the making of the note and the payment thereon; but allege as a defense thereto, and a counterclaim, that on the 4th of September, 1857, and

simultaneously with the execution of the note mentioned in the complaint, the defendants indorsed and delivered to the plaintiffs as collateral security for the payment of said note a certain other promissory note, made by one Willet Carpenter August 12, 1857, to the order of the defendants, for \$1,150, payable ninety days after the date thereof, with interest at ten per cent per annum; but if not paid at maturity, with interest at the rate of three per cent per month till paid; that at the time of the delivery and indorsement of said Carpenter note it was of the value of \$1,150, and that the plaintiffs agreed to and did receive the same as collateral security for said note mentioned in the complaint. The answer also avers that at the time of the indorsement of said note as collateral security, and at the time the same became due, Carpenter was solvent, and able to pay the same, and was the owner of a large amount of real and personal property in the county of Winona, of the value of ten thousand dollars and more, out of which the said note, principal and interest, could have been made and collected if the plaintiffs had used reasonable and proper diligence in the collection of said note; that Carpenter continued to own said property, and remained solvent and able to pay said note, for a long time after its maturity, viz., for eighteen months; and during said time the note with reasonable diligence might have been collected, of which the plaintiffs had notice.

That in July, 1859, Carpenter became and has since been and is still insolvent, and has no property out of which the note can be collected; that the note is not paid or collected, and is still in the hands of the plaintiffs; that the plaintiffs failed and neglected to present the note to Carpenter at maturity, or to demand payment thereof, or to notify defendants that the note was unpaid or dishonored, and failed to take any steps for the collection thereof; that in the spring or summer of 1858, and while said Carpenter was solvent and able to pay said collateral note, the defendants called upon the plaintiffs and informed them that the note could be collected from Carpenter, and requested the plaintiffs to sue or collect the same, or to permit these defendants to sue the said note, and then and there offered to indemnify said plaintiffs by good and sufficient real estate security for their debt in the premises; that the plaintiffs refused to sue said collateral note, or permit defendants to sue or collect the same, and so grossly neglected the same that said note and indebtedness of said Carpenter became and is wholly lost.

The third defense in the answer sets up an express agreement by the plaintiffs to collect the collateral security; otherwise it is substantially the same as the preceding one.

A fourth defense, supplementary to the defenses aforesaid, sets up that the plaintiffs have held said note for more than six years, and that the statute of limitations has run against the collateral note while in possession and under the control of the plaintiffs; and that long before the statute had run against the note the plaintiffs were urged by the defendants to take some steps for the collection of the same, or to suffer the defendants to do so, and that plaintiffs were offered full and ample security for such action, yet the plaintiffs have failed and neglected at all times to take any steps whatever for the presentation, demand, prosecution, or collection of the same from the maker. A jury trial was waived.

Upon the trial, the defendants admitted that the promissory note on which the action is founded is the joint property of the plaintiffs. The defendants called as a witness Willett Carpenter, the maker of the note mentioned in the defendants' answer as having been indorsed and transferred by them to the plaintiffs as collateral security for the payment of the note on which this action is founded, and the counsel for the defendants asked the witness the following question: "State whether you owned any property or real estate here on the fifteenth day of November, 1857, and during the year 1858." The defendants' counsel here state and admit that they do not intend or expect to prove the special or any contract or agreement of the plaintiffs to collect the Carpenter note set up in defense No. 2 other than the agreement implied by the indorsement and transfer of defendants to plaintiffs, and the receipt thereof by plaintiffs as collateral security for the payment of defendants' note mentioned in the complaint.

Thereupon the counsel for the plaintiffs objected to the question put to said witness, and the answer which he may make thereto, as immaterial. The court sustained the objection, and the counsel for defendants excepted to the decision of the court. Whereupon the counsel for the plaintiffs moved for judgment in their favor on the pleadings and the admissions above stated for the amount due on the note described in the complaint, for principal and interest, which motion was granted, and the defendants' counsel excepted. Judgment was thereupon ordered for the plaintiffs, and judgment entered, from which this appeal is taken.

Judgment having been entered upon the pleadings, if the answer of the defendants, qualified by their offer on the trial, sets up a defense, the judgment must be reversed. The question presented in this case, therefore, is, whether a creditor who holds a promissory note of a third party made to his debtor, and indorsed by such debtor to and received and held by the creditor as collateral security for his debt, is liable under such circumstances as are set forth in the answer for the loss of the note through the insolvency of the maker. Questions involving the rights and duties of holders of collateral securities have come up in various forms qualified by the nature of the agreement under which they were received and held, the relation of the parties to such agreement, and the character of the property held as collateral.

In this case, there is no express agreement with reference to the pledge; the rights and obligations of the parties, therefore, are such only as arise from the indorsement and delivery of a negotiable promissory note of a third person by the principal debtor as a security for his debt. No question as to the rights or obligations of a surety is involved, the question presented being between the immediate parties to the contract,—the principal debtor as pledgor, and the creditor as pledgee. So far as the authorities upon this subject are concerned, there is no doubt that the pledgee of negotiable paper as collateral security is bound to ordinary diligence in preserving the legal validity of the pledge, and answerable for a loss through a corresponding degree of negligence to the extent of such loss: 2 Parsons on Contracts, 5th ed., 511; *Jennison v. Parker*, 7 Mich. 355. And we think, as between the principal debtor and the creditor in a pledge of a similar character of negotiable promissory notes, for the payment of which third parties are responsible, the authorities both in England and in this country impose upon the pledgee ordinary diligence to preserve the pecuniary value of the pledge, requiring when necessary active measures to prevent a loss by the insolvency of third parties who are liable for their payment: *Ex parte More*, 2 Cox, 63; *Williams v. Price*, 1 Sim. & St. 582; Parsons on Contracts, 5th ed., 110, note t, citing *Noland v. Clark*, 10 B. Mon. 239; *Beale v. Mechanics' Bank*, 5 Watts, 529; 3 Lead. Cas. Eq., 3d Am. ed., 552, 556; *Lyon v. Huntington Bank*, 12 Serg. & R. 67. The same doctrine is recognized in *Bank of U. S. v. Peabody*, 20 Pa. St. 457; *Bitner v. Brough*, 11 Id. 127.

In *Wheeler v. Newbould*, 16 N. Y. 392, where the facts con-

stituting the pledge are substantially like those in the case at bar, Brown, J., delivering the opinion of the court of appeals, says: "The contract was a pledge of the notes, and not a mortgage. It was entirely silent as to the power of the pledgee on the subject of the pledge; it imposed no conditions and prescribed no terms in regard to the disposition of the notes in the event of the loan not being paid at maturity. His power and authority to deal with them is to be determined by the law. The notes were deposited in his hands as collateral security, and we are to say what that term imported, what rights it conferred, and what duties it imposed upon the pledgee. The primary and indeed the only purpose of the pledge is to put it in the power of the pledgee to reimburse himself for the money advanced when it becomes due and remains unpaid. *The contract carries with it an implication that the security shall be made effectual to discharge the obligation.*"

Although the question involved in that case was the proper disposition of the pledge, yet if this reasoning is sound, and especially the language we have taken the liberty of italicizing, there would seem to be little doubt that the pledgee in case of loss of the pledge through his negligence would be liable. See also *Atlantic F. & M. Ins. Co. v. Boies*, 6 Duer, 586; *Muirhead v. Kirkpatrick*, 21 Pa. St. 237-241.

In 3 Lead. Cas. Eq. 556, 557, discussing the question of collateral security, and giving the result of the cases, this language is used, speaking of the creditor: "On the other hand, he must use due diligence in the management and collection of securities binding the persons or estates of third persons, at the risk of discharging the debt itself if guilty of negligence, and with it, of course, all liability on the part either of principal or surety." See also *Lawrence v. McCalmont*, 2 How. 426; *Goodloe v. Clay*, 6 B. Mon. 236.

There are many other cases in which principles are enunciated tending to the same conclusion, which need not be cited. The cases of *Smouse v. Bail*, 1 Grant Cas. 397, and *Schroeppel v. Shaw*, 3 N. Y. 446, are relied upon as sustaining a contrary position.

The *syllabus* in *Smouse v. Bail*, *supra*, goes to the extent claimed, but an examination of the case shows clearly that the decision does not sustain the *syllabus* of the reporter. From the paper book of the plaintiff in error, which has been furnished us by the counsel for the respondent here, it appears that the facts in that case were as follows: In the spring of

1845, Smouse, residing in Missouri, and about to leave there, sold his pre-emption right to a tract of land in that state to one John Linus for \$260, of which \$60 was paid in cash, and Linus gave his note for the balance, \$200. This note was placed in the hands of a merchant in Missouri for collection, who gave Smouse a receipt for the same, dated the 19th of April, 1845, the same date with the note. On the 2d of January, 1846, Smouse purchased of Bail, in Pennsylvania, a blacksmith-shop, etc., for \$150, which Smouse agreed to pay, and for the better securing the payment of the same, assigned to Bail the receipt for the note given by the merchant with whom it was left for collection; Bail agreeing "that in the event of his receiving the whole amount of said note, to refund to said Smouse the surplus after deducting the said \$150." It was also proved that at the time of the transfer of the receipt for the note, Bail said he was going to Missouri, and that it would suit him to take it and collect it; that he was going for other purposes, but that it would suit him to attend to the collection of it. Upon this agreement and understanding Smouse transferred the note in the manner mentioned to Bail. Bail never collected the note, or in any way attended to it. Smouse gave notice to Bail to collect the note or return it to him for collection, both of which Bail refused to do. It also appears that Linus, the maker of the note, was insolvent, and had no property out of which the note could have been collected up to the time of his leaving Missouri; and that at one time he had proposed that if Smouse would refund him the amount he had paid he would transfer the land to him. The title to the land was in the United States, and Linus had only a pre-emption claim. It is manifest from these facts that there would be no liability on the part of Bail, for there was no loss occasioned by his negligence; the note could not have been collected of Linus with the exercise of diligence. Nor was Bail bound to effect the arrangement proposed by Linus, or to surrender to Smouse the collateral security, and upon these grounds the case was decided. Lowrie, J., says: "The debt was not lost by the want of diligence by Bail, but because he did not give back the claim to Smouse so as to enable him to make an arrangement which Bail could not have made. Surely it is plain that Smouse had no right to this until he should pay his debt to Bail," implying that if the debt had been lost by the want of diligence by Bail he would have been liable; and taken in connection with the charge of the judge in the court

below, "that if the collateral security was lost by the negligence of Bail, the debt upon which the suit was brought is extinguished," which is not in any manner disapproved, shows that it was not the intention of the court to determine that the holder of collateral security of this character was not to exercise ordinary diligence to preserve its value, but rather to recognize the principle established, as we think, by the courts of Pennsylvania to the contrary: See authorities cited *ante*.

The case of *Schroeppel v. Shaw*, 8 N. Y. 446, is not in point. In that case the action was brought by the surety, and not by the principal debtor, and stress is laid upon the fact that no notice had been given by the surety to his creditor to proceed; and the court, in reviewing the authorities applicable to the case of a surety, expressly distinguishes the cases of *Ex parte Moore*, 2 Cox, 63, and *Williams v. Price*, 1 Sim. & St. 581, as not applicable, because not involving the relation of principal and surety.

In *Ormsby v. Fortune*, 16 Serg. & R. 302, the express agreement of the parties controlled the decision and regulated the rights and liabilities of the parties.

In *Ex parte Moore*, *supra*, the debtor made an absolute assignment of the bond of a third person to his creditor as collateral security for a debt, and the bond was afterwards lost by reason of the insolvency of the obligor.

There seems to us to be great force in the views of the lord chancellor in that case when he says: "I am of opinion that whoever takes a bond in the manner this was taken makes it his own to the effect of binding himself to make it available as far as he can by ordinary diligence. Generally speaking, that which would be negligence in one employed to make the bond available must be so in one who has taken upon himself to make it applicable in payment of the debt of the assignor, and who is invested with complete authority for that purpose."

By the unqualified indorsement and the delivery of the note by the payees before maturity under the law merchant the legal title to the note and the indebtedness passed to the plaintiffs, and during the pledge was entirely under their control, subject to the right of the defendants to have it applied to the payment of the debt, and their interest in the surplus after payment. The plaintiffs, therefore, were clothed with all the power necessary to collect the note by suit or otherwise, and preserve not only the identical note and its lega-

efficacy, but also to protect and secure the indebtedness of which it is the evidence, and which was likewise embraced in the pledge; and the defendants, on the other hand, were deprived of this power by the pledge while the debt remained unpaid.

If it be urged that the debtor, being in default, can claim no equity as against the creditor so long as he continues in default, it is a sufficient answer, we think, to say that the default is necessarily recognized by the creditor in taking the collateral security, and his responsibilities in respect to the collateral security are all assumed in view of that event, and are implied by law from the contract.

It is established by the authorities, some of which are before cited, that the pledgee of negotiable paper is bound to ordinary diligence to preserve the legal efficacy of the pledge by demand and notice when necessary to preserve such efficacy, yet to do this the pledgee must resort to active measures and incur expense. The reason for thus requiring the preservation of the legal validity of the pledge by the pledgee must be for the purpose of preventing its pecuniary value from being impaired, and because the pledgee only can do it. Upon what principle, then, can it be said that the pledgee is not required to use ordinary diligence to preserve the pledge from loss by the insolvency of third parties who are liable therefor? It is to be observed that it is not the insolvency of the debtor himself that is to be guarded against, but a third person; the great object in both cases is to preserve the pecuniary value of the property. To do this, active measures involving expense are required in the one case, and are necessary in the other. The same degree of diligence is required in each case, and in both the pledgee alone can resort to the means necessary for the preservation of the pledge.

But further, if the position of the respondents is correct, the debtor may be left entirely without remedy. A note given as collateral security may be due long before the principal debt matures. In such case the creditor is not bound to receive the debt until it is due, yet he has entire control of the collateral security. It may be the note of a third person, who is on the eve of insolvency; the creditor refuses to preserve the collateral security by its collection; the hands of the debtor are tied; he is in no default whatever; yet he must stand by and see his property becoming utterly worthless by the insolvency of the maker of the note, or if a remedy exists, it is to compel the

creditor to active measures for the preservation of the debt, which is the very ground of objection to this defense.

But in case of an ordinary pledge of tangible personal property, the pledgee is bound to ordinary diligence in the preservation of the property, whether it be perishable or not. What would be ordinary diligence in the one case would not be in the other; but the diligence is required, whatever may constitute it. The identical property, when it can, must be preserved; but if it cannot, then the value must be preserved. Why will not the same rule apply to bills, notes, bonds, and other choses in action? It is not alone the bill, note, or bond that is pledged, for those are but the evidence of the indebtedness, but the indebtedness itself is the substantial matter of the pledge. It is as capable of protection as the paper or contract which is the evidence of it. The latter may be lost without impairing the former; but if the former is lost, the latter is valueless. The indebtedness, then, is the substantial pledge; and as men in the exercise of ordinary care generally preserve property of their own of this character, they may also by the same care preserve it when it is the subject of a pledge; and as between the parties to a contract of pledge like the one under consideration, we see no reason why the pledgee is not answerable when the pledge is lost through his negligence.

We are therefore of opinion that the respondents were required to exercise ordinary diligence to preserve the debt from loss by reason of the insolvency of the maker, and to do so under circumstances like the present were required to resort to active efforts to collect the same by action.

If we are right in this position, the averments of negligence in the answer, we think, are clearly sufficient, and do not deem it necessary to discuss the same in detail. The answer therefore sets up a good defense, and the motion for judgment on the pleadings should have been denied. The solvency of Carpenter, the maker of the note, in November, 1857, and during 1858, and his ownership of property at that time, was an essential feature in the appellants' case, and the question put to Carpenter on this subject, which was overruled by the court on the respondents' objection, was material, and should have been allowed.

The judgment appealed from, and the order therefor, are reversed, and a new trial awarded.

WILSON, C. J., being a party to this action, took no part in the argument, consideration, or determination of it.

OBLIGATION OF PLEDGER OF NEGOTIABLE PAPER TO DILIGENCE: *Miller v. Gettysburg Bank*, 34 Am. Dec. 449, 451, note, and cases cited; *Commercial Bank v. Martin*, 45 Id. 87; *Pickens v. Yarrowburgh's Adm'r*, 62 Id. 728; *Robinson v. Hurley*, 79 Id. 503, note, and cases cited; *Roberts v. Thompson*, 82 Id. 463.

RIGHT OF PLEDGER TO COLLECT COLLATERAL SECURITY: *Hend v. Newsa*, 26 Am. Dec. 616, 619, note, and cases cited; *Rowe v. Haines*, 77 Id. 101; *Pickens v. Yarrowburgh's Adm'r*, 62 Id. 728; *Crosby v. Rosh*, 84 Id. 720; *City Bank of New Haven v. Perkins*, 86 Id. 332.

THE PRINCIPAL CASE IS CITED in the same case, upon a second appeal, in 18 Minn. 514, in which the court observed that the former decision does not go to the extent of holding that the solvency of the maker of the collateral note is essential to charge the plaintiff with loss, but the court so distinctly held upon the second appeal.

CASES
IN THE
HIGH COURT OF ERRORS AND
APPEALS
OF
MISSISSIPPI.

COFFMAN v. BANK OF KENTUCKY.

[40 MISSISSIPPI, 23.]

CONSTITUTIONAL LAW. — **OBLIGATION OF CONTRACT HAS REFERENCE TO ITS PERFORMANCE** rather than to the consequences of a breach. The rights of the parties with respect to the nature, construction, and effect of the contract are beyond the legislative power to change.

REMEDY PERTAINS TO FORUM, OR TO MODES OF PROCEEDING at the time and place of enforcement, and with certain restrictions and limitations, is subject to the legislative power.

WHEN REMEDY IS ESSENTIAL PART OF CONTRACT it cannot be changed. To take away all legal remedies, or so to change and obstruct them as materially to impair the value and benefit of the contract, is within the prohibition of the constitution.

"STAY LAWS" WHICH PREVENT ALL PROCEEDINGS IN COURTS for the collection of debts, with few exceptions, for a long period, are unconstitutional.

POWER OF LEGISLATURE TO SUSPEND LAWS conferred by the declaration of rights does not include a power to transcend or suspend the constitution, or to suspend any rights guaranteed thereby.

ACTS CLEARLY UNCONSTITUTIONAL MUST BE DECLARED SO BY JUDICIARY without reference to their expediency; and the pecuniary interests of the people, or sympathy for their misfortunes, cannot be considered.

THE opinion states the facts

C. E. Hooker, for the plaintiff in error.

William Yerger and John D. Freeman, for the defendant in error.

By Court, **HANDY, C. J.** This case is submitted to the court on a motion, made in behalf of the plaintiff in error, to con-

tinue it, in virtue of the acts of the legislature of August 5, 1861, and December 1, 1865, each entitled "An act to modify the collection laws of this state." The judgment in the court below was against the plaintiff in error, the acceptor, drawer, and indorser of a bill of exchange, and in favor of the defendant in error, the holder thereof; and it is contended in support of the motion that this court cannot now proceed to judgment in the case because of the operation of these acts of the legislature.

In considering the present motion, it is necessary to refer only to the latter act, since its provisions appear to repeal those of the former act which might be applicable to this case.

The first section of the latter act provides "that all laws for the collection of debts on bonds, promissory notes, bills of exchange, open accounts, or any other contract or liability for the payment of money, are hereby suspended until the first day of January, 1868, or until otherwise ordered by law, except in cases of official liabilities; and provided that no creditor shall be deprived of his remedy by attachment or distress as now provided by law; provided that the provisions of this act shall not be so construed as to prevent guardians from collecting such parts of debts due their wards as the probate court having jurisdiction of the same may determine to be necessary to the support and education of such wards."

Section 2 provides "that this act shall not apply to parties who have cases now pending in the courts, and who agree in open court to proceed to trial."

Section 5 provides "that this act shall not apply to contracts or liabilities made and entered into after its passage; provided such contracts or liabilities are not founded on indebtedness existing prior to the passage of this act; nor shall this act apply to debts due to the school funds of the several townships and counties in this state."

And section 7 repeals all acts in conflict with this act.

In opposition to the motion, it is insisted in behalf of the defendant in error that this act is in violation of the clause of the tenth section of article 1 of the constitution of the United States,—that "no state shall pass any law impairing the obligation of contracts"; and the nineteenth section of the declaration of rights, prefixed to the constitution of this state, containing the same prohibition to the legislature; and the fourteenth section of the same declaration, requiring "that all

courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law and right and justice, administered without sale, denial, or delay"; and hence that the act in question is inoperative and void. We are thus called upon to determine whether or not this act transcends the bounds of the power of the legislature of this state, and is therefore void.

It is argued by the counsel for the defendant in error that the legal remedies existing at the time the contract was entered into form a part of the contract, and constitute a part of the obligation on the one party, and of the right acquired by the other; that the law gives the right to enforce performance by the remedies then in force; and that any act of the legislature materially altering those remedies is an impairing of the obligation of the contract, and within the prohibition of the constitution.

This position, though sanctioned by high authority, we cannot regard as sound to the broad extent in which it is stated.

The "obligation" of a contract imports, for the most part, its binding force upon the obligor to perform the duty agreed on according to the nature and terms of the contract. It has reference to the performance, rather than to the consequences of a breach, of the contract. The essential constituents of the contract are its validity, construction, effect, and discharge, and these are governed by the law in existence at the time it was made, which enters into and forms a part of it, and follows it wherever it may be sought to be enforced. But the remedy is for the most part the act of the law-making power, providing a mode of redress for the wrong occasioned by a breach of the contract. It does not necessarily constitute a part of the obligation of the contract; and except in cases of peculiar character, it is subject to the right of modification or repeal which is the prerogative of the legislature. Hence it is a familiar rule that the nature, construction, and effect of a contract are governed by the law existing when and where it was made or where it is by its terms to be performed; and in this respect the rights of the parties under the contract are beyond the legislative power. But the remedy pertains to the forum; that is, to the modes of proceeding existing at the time and place at which its enforcement may be sought; and these, with certain restrictions and limitations, are generally held to be subject to the legislative power of the state.

But the position under consideration appears to us in its breadth to confound the settled distinctions between rights accruing under contracts and remedies for their enforcement,—distinctions which are founded in the nature of the subject, have always been recognized by the highest courts in this country, and are admitted in the cases which appear to sanction the broad position here contended for. For if it be true that the remedies existing at the time of making the contract become a part of it to the extent to give the right to enforce performance by the remedies then in force, it appears to us to lead unavoidably to the conclusion that no subsequent change could be made by the legislature in the terms of the courts, nor in the pleadings and practice, nor in the time of rendering judgment, nor in presenting appeals or writs of error, nor in the statute of limitations, which would in any way retard the process of enforcing performance of the contract which existed at the time it was made; and the still more untenable consequence would follow that this remedy would have to be pursued in whatever forum a suit might be instituted, whether at home or in a foreign state. Yet it is admitted in all these cases that these are matters within the legislative power, and not within the prohibition of the constitution,—an admission which appears to be irreconcilable with the broad rule stated in some of those cases.

It is true, there may be cases in which the remedy existing at the time of entering into the contract may become an essential part of it. But these must be cases of peculiar character, and generally they are instances of remedies specially provided by the terms of the contract, or by provisions of law securing particular rights and remedies, rather than cases under the operation of general rules regulating remedies and modes of judicial procedure. Of this character are the cases of *Bronson v. Kinzie*, 1 How. 311, and *Green v. Biddle*, 8 Wheat. 1.

But this power of the legislature over remedies is not without restriction; and any legislation which impairs the value and benefit of the contract, though professing to act upon the remedy, must impair the right intended to be secured by the contract, and come within the evil intended to be prohibited by the constitution. For though the particular remedy existing at the time of making the contract is not an essential part of it, yet no contract would be of any value without a remedy to enforce it. Its obligation would be nugatory if all remedy to enforce it were taken away, and it would be impaired if the

remedy were obstructed and rendered impracticable. The remedy is therefore an incident to the contract. And though the party may have no right under the contract to any particular remedy, yet he has a right at all times to some adequate and available remedy to enforce it; and that is manifestly within the contemplation of the contract. Hence, it has been held generally by courts and jurists of the highest authority in this country that acts of the legislature preventing all legal remedies on contracts, or so changing and obstructing them as materially to impair the value and benefit of the contract as it existed when made, are violations of the contract, and within the prohibition of the constitution of the United States. We will cite some passages from a few of these decisions.

In *Curran v. State of Arkansas*, 15 How. 319, the supreme court of the United States uses the following language:—

“It by no means follows because a law affects only the remedy that it does not impair the obligation of the contract. The ‘obligation of a contract,’ in the sense in which those words are used in the constitution, is that duty of performing it which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same.”

In *Bronson v. Kinzie*, 1 How. 316, 317, the same court says:—

“Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution. . . . It is manifest that the obligation of the contract and the rights of the party under it may in effect be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions and restrictions so as to make the remedy hardly worth pursuing.”

In *McCracken v. Hayward*, 2 How. 612, 613, the same court says: “Any law which in its operation amounts to a denial or obstruction of the rights accruing by the contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution. . . . The obligation of the contract between the parties in this case was to perform the promises and undertakings contained therein; the right

of the plaintiff was to damages for the breach thereof, to bring suit and obtain judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions."

And this court, after citing the above passages from the last two cases, says:—

"These decisions certainly establish the principle that all legislation which materially affects the laws for the enforcement of a contract existing at the time it is made impairs the obligation of the contract. . . . To this extent the influence of the decisions meets with unqualified acknowledgment": *Nevitt v. Bank of Port Gibson*, 6 Smedes & M. 523.

Chief Justice Parsons says in *Call v. Haggin*, 8 Mass. 430: "If the legislature of any state were to undertake to make a law preventing the legal remedy upon a contract lawfully made and binding on the party to it, there is no question that such legislature would by such act exceed its legitimate powers."

In *Tarpley v. Hamar*, 9 Smedes & M. 314, this court says "that any legislation that might lessen the extent or efficacy of the remedy on existing contracts, or which changes or diminishes the force of existing liens, might be objectionable."

And these principles have been affirmed in this court in a more recent case, as follows:—

"It is too well settled to admit of question at the present day, . . . that it is within the power of the state legislatures to regulate the remedy and modes of proceeding in relation to past as well as to future contracts. This power is subject only to the restriction that it cannot be exercised so as to take away all remedy upon the contract, or to impose upon its enforcement new burdens and restrictions which materially impair the value and benefit of the contract": *Briscoe v. Anketell*, 28 Miss. 371.

Let us now consider the character of the legislation now before us.

It is urged that it is within the legitimate powers of the legislature because it pertains to the remedy. But is that its true character?

It contains no provision whatever in relation to the process

or course of judicial procedure on suits which might have been instituted on the causes of action enumerated, but it interposes a positive interdict against the institution of any such suits. It does not attempt to make any new regulations in relation to the prosecution of suits then pending, or any proceedings to be had therein, but absolutely prevents all proceedings in such suits for more than two years. Instead of modifying the remedies existing for the causes of action specified, or providing new remedies thereon, it takes away all remedies upon them, with a few exceptions, and closes the courts as to all remedies upon them for a period exceeding two years. This can with no propriety be classed or justified as legislation regulating remedies, but is in effect a denial of all remedy upon the causes of action enumerated for the time specified. It is therefore clearly within the principles above stated, and comes within the prohibition of the constitution of the United States, and of the nineteenth section of our declaration of rights.

We will now consider the objection to the constitutionality of this act based on the fourteenth section of the declaration of rights, which requires "that all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law and right and justice, administered without sale, denial, or delay."

What is "due course of law" in this respect is not left in uncertainty, but can be ascertained by other provisions of the constitution; and accordingly the fifteenth section of article 4 of the constitution requires that "a circuit court shall be held in each county of this state at least twice in each year"; and the seventh section of the same article requires that "the high court of errors and appeals shall be held twice in each year, at such place as the legislature shall direct," etc. These requirements are positive and imperative, and are in furtherance of the provision of the declaration of rights that "right and justice should be administered without denial or delay." The plain intention was, that these courts should be open at least twice in each year, in order that every person should have full and free remedy, in the ordinary forms of law, for all injuries done him in any of his rights of person or of property. If this privilege is denied or prohibited by act of the legislature as to any of the rights of the citizen, it is as effectually a violation of the constitutional right as if the legisla-

ture had enacted that these courts should be entirely closed; for the denial of the remedy at the prescribed terms of these courts is in effect the same as to those rights and remedies as if the courts had been directed to be entirely closed. There cannot be a doubt that if the legislature had passed an act requiring these courts to be entirely closed until the first day of January, 1868, it would have been a violation of the provisions of the declaration of rights and of the constitution referred to; and it is equally clear that an act requiring them to be closed as to certain specified rights and remedies of the citizen is of the same character. For the citizen is thereby deprived of remedies positively guaranteed to him by the organic law, the courts are not open to him for redress of his injuries, and right and justice are denied and delayed.

It appears, therefore, to be clear beyond doubt that the act of the legislature in question is repugnant to these provisions of the declaration of rights and of the constitution of this state, and must be held inoperative and void for that reason.

But it is argued in support of the validity of the act that the legislature is clothed with power to suspend the laws of the state by the fifteenth section of the declaration of rights, which provides "that no power of suspending laws shall be exercised except by the legislature or its authority"; and that the act in question is but an exercise of the power thus granted.

It must be conceded that this recognizes in the legislature the power to suspend the laws in general. But this recognition of power must be so construed as to harmonize with other provisions of the constitution, and will not admit of a construction which would defeat other specific provisions of the instrument, and violate individual rights therein positively guaranteed. The act in question does not suspend merely the laws of the state for the collection of debts, but, in our view, it contravenes the provisions of the declaration of rights and of the constitution, and suspends the rights thereby positively guaranteed, and the remedies thereby required to be enforced; and it cannot be pretended that under a power to suspend the laws the legislature has power to transcend the constitution by doing violence to the rights of person and of property thereby guaranteed.

We have seen that these rights are positively guaranteed to the citizen; and to show how high and sacred they were regarded by the framers of the constitution, the conclusion of the declaration of rights ordains that they, and other specified

rights, are "excepted out of the general powers of government, and shall ever remain inviolate." They were therefore emphatically placed beyond the power of the legislature.

Whilst it is true, therefore, that the legislature has the power to suspend the laws generally, it has no power to suspend the rights of person and of property guaranteed to the citizen in the declaration of rights, and required by the constitution to be enforced at stated times; for that would be to suspend the constitution.

It is a delicate duty, under any circumstances, for this court to pronounce an act of a co-ordinate department of the government unconstitutional and void; and the duty is especially painful when the act proceeded, as this evidently did, from the well-meant policy of relieving as far as might be the pecuniary distresses and prostration of a people unparalleled in all our history,—a state of things which appeals almost irresistibly to every benevolent mind, in which we all sympathize, and by which the interests of us all are most seriously affected. But sitting here as the court of last resort of the state, and charged by the constitution with the duty to support that constitution, and to sit in judgment upon the constitutional validity of the acts of the other departments of the government, we are not permitted to yield to feelings of delicacy to the legislature, or of personal sympathy for the misfortunes of our people, when called on to discharge this high duty; but we are bound by the most solemn obligations to respond truly and in the exercise of our best judgment to the question whether the act is in violation of the constitution of the United States or of this state. If this question were merely doubtful, we should defer to the wisdom of the legislature and act upon the presumption that the act is within their legitimate powers. But when it is the clear and deliberate conviction of our judgments that the act is repugnant to either of these constitutions, we must perform the duty committed to us and pronounce our judgment accordingly. Convinced as we all are, for the reasons above stated, that such is the character of the act of the legislature in question, we must hold it to be inoperative and void as to the case presented in this record; and the motion before us must be overruled.

IMPAIRING OBLIGATION OF CONTRACTS: *Derby Turnpike Co. v. Parks*, 27 Am. Dec. 700; *Lewis v. Brackenridge*, 12 Id. 228; *Smith v. Ward*, 8 Id. 183; *Goshen v. Stonington*, 10 Id. 134, note, and cases cited; *Davis v. Minor*, 28 Id. 325; *King v. Dedham Bank*, 8 Id. 112; *Gray v. Monongahela N. Co.*, 37 Id.

500; *Winter v. Jones*, 54 Id. 379; *Bruce v. Schuyler*, 46 Id. 447; *Peares v. Patton*, 45 Id. 61; *Robinson v. Magee*, 70 Id. 638; *Scobey v. Gibson*, 79 Id. 490, 495, note, and cases cited; *Trustees v. Bailey*, 81 Id. 194.

REMEDY MAY BE REGULATED: *Sommers v. Johnson*, 24 Am. Dec. 604; *Johnson v. Duncan*, 6 Id. 675; *Wynne's Lessee v. Wynne*, 58 Id. 66; *Oriental Bank v. Freeze*, 36 Id. 70; *Baughner v. Nelson*, 52 Id. 694; *Bailey v. Phila. etc. R. R.*, 44 Id. 593; *Lycoming v. Union*, 53 Id. 575; *Hepburn v. Curtis*, 32 Id. 760, note, and cases cited; *Bruce v. Schuyler*, 46 Id. 447; *Bolton v. Johns*, 47 Id. 404; *McMillan v. Sprague*, 35 Id. 412; *Bangor v. Goding*, 56 Id. 688; *Brown v. Dillahunty*, 43 Id. 490; *Coffin v. Rich*, 71 Id. 559; *Schenley v. Commonwealth*, 78 Id. 359; *Morse v. Gould*, 62 Id. 103, 112, note, and cases cited; *Coriell v. Ham*, 61 Id. 134; *Scobey v. Gibson*, 79 Id. 490; *Briscoe v. Ankstell*, 61 Id. 553; *Von Baumbach v. Bade*, 76 Id. 233; *Cook v. Gray*, 81 Id. 185.

REMEDY CANNOT BE TAKEN AWAY, OR RENDERED IMPRACTICABLE: *Townsend v. Townsend*, 14 Am. Dec. 722; *Jones v. Crittenden*, 6 Id. 531, 540, note, and cases cited; *Baily v. Gentry*, 13 Id. 484, 493, note, and cases cited; *Kennebec Purchase v. Laboree*, 11 Id. 98, note, and cases cited; *Bruce v. Schuyler*, 46 Id. 447; *Baughner v. Nelson*, 52 Id. 694; *Scobey v. Gibson*, 79 Id. 490; *Robinson v. Magee*, 70 Id. 638; *Von Baumbach v. Bade*, 76 Id. 293, note, and cases cited; *Moore v. Luce*, 72 Id. 629; *Davis v. Pierce*, 82 Id. 65.

CONSTITUTIONALITY OF STAY LAWS: *Townsend v. Townsend*, 14 Am. Dec. 722; *Baily v. Gentry*, 13 Id. 484; *Johnson v. Duncan*, 6 Id. 675; *Jones v. Crittenden*, 6 Id. 531; *Scobey v. Gibson*, 79 Id. 490.

EXPEDIENCY OF LAW CANNOT BE CONSIDERED: *Winter v. Jones*, 54 Am. Dec. 379; *Taylor v. Comm'rs of Newberne*, 64 Id. 566.

THE PRINCIPAL CASE IS CITED in *Stephens v. Osborne*, 41 Miss. 131, to the point that the power of the legislature over remedies may be abused. In the cases of *Lesley v. Phippe*, 49 Id. 790, and *Johnson v. Fletcher*, 54 Id. 628, it is held that an exemption law cannot be at all enlarged as to existing debts, and in so far as *Stephens v. Osborne*, *supra*, holds to the contrary, it is overruled.

MALONE v. McLAURIN.

[40 MISSISSIPPI, 161.]

TENANCY BY CURTESY EXISTS only where there is a marriage, birth of issue, death of the wife, and a seisin, either actual or constructive, by the wife during coverture. The right of possession of uncultivated land draws to it the possession, if the land is not held adversely, and is a sufficient seisin to support the right of curtesy. Land held by a tenant at sufferance, or for years, or of any estate less than freehold, is deemed in the possession of the wife as reversioner.

WIFE HAS NO SEISIN OF REMAINDER IN FEE, EXPECTANT UPON LIFE ESTATE, if she dies before the determination of the life estate, and there can be no tenancy by the curtesy of such remainder or reversion.

THE opinion states the facts.

R. G. Rives, for the plaintiff in error.

R. C. Farrar, for the defendant in error.

By Court, ELLETT, J. The plaintiff in error presented a petition to the probate judge of Kemper County, under the eighth section of the thirty-sixth chapter of the Revised Code, relating to the position of lands among joint tenants, etc., praying the appointment of commissioners to make partition of the land therein described. The petition stated that John McLaurin died March 16, 1856, leaving a will whereby he bequeathed the land in question to his wife Margaret for her natural life, and after her death to be equally divided among his six children, one of whom at the date of his will and at the death of the testator was the wife of the petitioner; that petitioner's wife, early in 1857, gave birth to a child, who lived but a few days, and that the mother died soon after; and that the said Margaret, the devisee of the estate for life, died in May, 1861. Petitioner claims one sixth of the land for his own life, as tenant by the curtesy.

The other parties in interest appeared before the judge of probate and filed a demurrer to the petition, which was sustained by the judge, and the petition dismissed, from which decision the petitioner prosecutes this appeal.

Three things necessary to create a tenancy by the curtesy exist in this case: marriage, the birth of issue, and the death of the wife. The only question is, whether the wife had, at any time during coverture, such a seisin as would entitle the husband to his curtesy. By the common law a seisin in law was not sufficient; but a seisin in fact, that is, an actual possession, was required. This rule has been so far relaxed that a seisin in fact is not always necessary; but a constructive seisin will, in some cases, have the effect to invest the husband with his estate by the curtesy without an actual entry. Where the possession is vacant, as in the case of wild or uncultivated land, or where the parties in possession stand in the relation of tenants, either at sufferance or for a term of years, the right of curtesy attaches. The present right draws to it the possession where the land is not held adversely; and the possession of the lessee for years is deemed the possession of the wife as reversioner: *Day v. Cochran*, 24 Miss. 261; *Rabb v. Griffin*, 26 Id. 579; 4 Kent's Com. 29.

In this case, the interest of the wife was a vested remainder in fee, expectant upon a life estate in the widow of the testator. She died before the determination of the life estate, and therefore never acquired any right to the actual possession and enjoyment of the estate. In such a case the rule is clearly

stated by Chancellor Kent: "But if there be any outstanding estate for life, the husband cannot be tenant by the curtesy of the wife's estate in remainder or reversion, unless the particular estate be ended during the coverture": 4 Kent's Com. 29. To the same point is the case of *Gentry v. Wagstaff*, 3 Dev. 270. Sir William Blackstone says: "A man shall not be tenant by the curtesy of a remainder or reversion": 2 Bla. Com. 127. But this proposition is restricted by the later authorities to cases of remainders or reversions expectant upon estates of freehold; and upon a reversion expectant upon an estate for years, the right of curtesy and dower both accrue, for the reason that the possession of the tenant for years constitutes a legal seisin of the freehold in reversion: *Stoughton v. Leigh*, 1 Taunt. 410; *De Gray v. Richardson*, 3 Atk. 470; *Goodtitle v. Newman*, 8 Wils. 521.

The wife of petitioner not having been seised of the land in such manner as to give rise to the curtesy, it follows that the decision of the probate judge was correct, and must be affirmed.

WHEN TENANCY BY CURTESY MAY EXIST: *Jackson v. Jackson*, 15 Am. Dec. 433, 449, note, and cases cited; *Stevens v. Smith*, 20 Id. 205; *Duncomb v. Duncomb*, 7 Id. 504; *Cochran v. O'Hern*, 39 Id. 60; *McCorry v. King*, 39 Id. 165; *Wells v. Thompson*, 48 Id. 76; *Mulkany v. Mullany*, 31 Id. 238; *Hyde v. Barney*, 44 Id. 335; *Leases of Merrill v. Horne*, 67 Id. 298; *Reed v. Reed*, 75 Id. 777; *Gardner v. Klutts*, 80 Id. 331; *Mutual Ins. Co. v. Deale*, 79 Id. 673; *Johnson v. Cummins*, 84 Id. 142.

CONSTRUCTIVE SEISIN OF WIFE SUFFICIENT: *Jackson v. Johnson*, 15 Am. Dec. 433; *McCorry v. King*, 39 Id. 165; *Wells v. Thompson*, 48 Id. 76; *Leases of Merrill v. Horne*, 67 Id. 298, 302, note, and cases cited.

LIFE ESTATE MUST BE DETERMINED DURING COVERTURE to sustain curtesy in the reversion: *Reed v. Reed*, 75 Am. Dec. 777.

THE PRINCIPAL CASE IS CITED with approval to the point that there must be a seisin by the wife during coverture, either in fact or in law, to sustain a tenancy by curtesy, in *Rebus v. Hayden*, 43 Miss. 685; and in *Stewart v. Bass*, 50 Id. 789.

MAGEE AND WIFE v. YOUNG.

[40 MISSISSIPPI, 184.]

WIDOW WITH SEPARATE ESTATE EQUAL TO HER SHARE OF HUSBAND'S ESTATE HAS NO DOWER under the law of Mississippi.

RIGHT OF DOWER IS INCHOATE, AND NOT VESTED, until after the death of the husband, leaving a surviving wife. Such inchoate right is a mere possibility, and not an estate.

CONSTITUTIONAL LAW. — VESTED RIGHTS ARE NOT IMPAIRED BY CHANGE IN LAW OF DOWER during the lifetime of the husband; nor by a change

in the husband's rights to such choses in action of the wife as have not been reduced to possession during coverture.

MARRIAGE IS NOT CONTRACT, WITHIN MEANING OF CONSTITUTION, which prohibits the passage of laws impairing the obligation of contracts; but is an institution of the state, founded on reasons of public policy.

RIGHT OF DOWER IS NOT FOUNDED IN CONTRACT, but results from marriage as a legal incident thereto, and may be controlled by the legislature as a subject-matter of public policy.

THE opinion states the facts.

E. Safford and F. H. Sleeper, for the appellants.

D. W. Hurst, for the appellees.

By Court, **HANDY, C. J.** This was a petition in the court of probate for the allotment of dower to the widow of James Young, deceased, in his real estate.

It appears by the petition and the answer of the appellee, the administrator of the deceased husband, that the appellant and the deceased were married prior to November, 1857, and that prior to that time he acquired the lands in which dower was sought to be recovered, and that he died seised thereof in the year 1860, and intestate; that his personal estate was insufficient to pay his debts, and that his lands had been decreed by the court of probate to be sold for that purpose; that at the time of his death his widow had separate property in her own right, equal in value to what would be her lawful portion of her husband's real and personal estate, which portion would not exceed two thousand five hundred dollars, and her separate estate, so owned and held by her, was of the value of six thousand dollars; and upon these grounds the administrator resisted the application for dower, and on the hearing the petition was dismissed.

It appears that the marriage and the seisin of the husband of the lands in question took place before the provisions of the Revised Code touching the subject went into operation, on the first day of November, 1857, but that his death took place after that time. And it has been held by this court that, both in cases of testacy and intestacy, where a husband dies leaving a widow with a separate estate, her right to dower in the real estate is controlled by the provisions of article 80 of the Revised Code, 337; and this in virtue of the provision in article 176 of the Revised Code, 470: *Whitley v. Stephenson*, 38 Miss. 113. The result is, that in cases embraced in these statutes, the widow is not entitled to dower in the real estate of her husband where she had a separate property at the time of his death

equal in value to what would be her portion of her husband's real and personal estate.

But it is contended in behalf of the widow that these provisions of law cannot affect her, because her right of dower became a vested interest in consequence of her marriage and the seisin of the husband during the coverture, which took place before these provisions were enacted; and that it was not competent for the legislature to interfere with her right thus vested. And the question presented is, whether it is competent for the legislature to modify and change the laws in relation to dower to have effect upon cases where the marriage and seisin have taken place before the passage of the act, but the title has not been consummated by the death of the husband; and this depends upon the nature and character of the right of dower before the husband's death.

It is unquestionably true that the concurrence of marriage and seisin constitutes the foundation of the right of dower; but they do not of themselves vest the title in the wife: *Park on Dower*, 7. They give rise to an inchoate right, which does not become complete until the death of the husband: 4 *Kent's Com.* 50. And an inchoate right of dower is a mere possibility, and not an estate: 1 *Hilliard on Real Property*, 601, sec. 28; because it is liable at any time to be defeated by the death of the wife, the husband surviving. From the death of the husband, the incipient title which existed in the wife during coverture becomes consummated and perfected: *Park on Dower*, 247; 1 *Cruise Dig.*, tit. 6, sec. 1; and until that time it is not a vested estate, but a mere contingent interest or a chose in action: 4 *Kent's Com.* 61.

This right appears to be analogous to that of a husband to his wife's personal property and choses in action not reduced to possession by him during the coverture. That is a qualified right, upon the condition that he reduce them to possession during coverture,—a condition precedent that must be performed before the right becomes vested. So in this case, the right of dower depends for its substantial exercise upon the contingency that the wife survive the husband; and until that occur, no interest becomes vested in the wife. It is settled by this court that such right of the husband to the wife's choses in action is not a vested right; and that, before such right becomes vested by the husband reducing the choses in action to possession, the legislature has power, as a matter of public policy, to provide that all property thereafter acquired by the

wife during coverture, or coming to her possession, shall inure to the sole and separate use of the wife, excluding any right on the part of the husband; and this to apply to cases of marriage contracted before as well as after the passage of the act: *Clark v. McCreary*, 12 Smedes & M. 347. The power of the legislature over the inchoate and contingent right of the wife to dower in the husband's lands during his life appears to stand upon the same principle, and to be equally well founded in justice to secure a correlative right in the husband.

It appears, therefore, that the right of the wife, proceeding merely from the marriage and coisin, the husband living, was not such "an immediate fixed right of present or future enjoyment" as is held to be necessary to constitute a vested interest, *Marshall v. King*, 24 Miss. 90, but a mere possible and contingent interest. And hence, as a matter of public policy, it was not beyond the power of the legislature to make laws modifying and defining the enjoyment of the right on the ground that such legislation would divert vested rights.

It is suggested that such legislation is obnoxious to constitutional objection, because it has the effect to impair the obligation of the contract of marriage, in consequence of which the wife became entitled to her dower in all the lands of which her husband was seised during coverture.

This question has been the subject of much difference of opinion in the courts of many of the states of the Union.

The view suggested here appears to be sanctioned in Missouri, Florida, and in part in New York: *State v. Fry*, 4 Mo. 120; *Bryson v. Campbell*, 12 Id. 498; *Ponder v. Graham*, 4 Fla. 23; *Kelly v. Harrison*, 2 Johns. Cas. 29 [1 Am. Dec. 154]; *Jackson v. Edwards*, 22 Wend. 498; while a different rule is held in Kentucky, Maine, Connecticut, and in other cases in New York: *Maguire v. Maguire*, 7 Dana, 184; *Opinion of Justices*, 16 Me. 479; *Starr v. Pease*, 8 Conn. 548; *Moore v. Mayor etc.*, 8 N. Y. 110; *White v. White*, 5 Barb. 474.

It is to be observed that in most of these cases the question was, whether the marriage itself, as a personal relation between the parties, was a matter of contract within the meaning of the constitution, so as not to be liable to be dissolved by legislative act. The view taken of the question in the latter class of cases above cited is, that marriage was a matter *publici juris*, created by public law, subject to the public will, and not to that of the parties, who could not dissolve it by mutual consent; that it was more than a contract, because it established fundamental

domestic relations, affecting the welfare of the community; that it was an institution of the state founded on reasons of public policy, and was therefore not embraced within the inhibition of the constitution: *Maguire v. Maguire*, 7 Dana, 184; *Moore v. Mayor etc.*, 8 N. Y. 110. This view is sanctioned by Chancellor Kent, 1 Com. 417, note, and it appears to us to be well founded in reason and principle.

But dower is not a matter of marriage contract. It is no more so than the right of the husband to the choses in action of his wife not reduced to possession during coverture; which right, as we have seen, is settled by this court to be within the power of modification by the legislature: *Clarke v. McCreary*, *supra*; *Marshall v. King*, *supra*. In both cases the respective rights are incidents to the marriage, and result from it to the extent to which they go, but are not the subjects of positive contract. Dower is not a right founded in contract, but one resulting from the fact of marriage, as an incident to it, and as a matter of social and domestic policy of the state; and therefore it is that a widow is entitled to dower in England, though the marriage took place in a foreign country where the common-law right of dower did not exist: *Park on Dower*, 21, 22; 2 Bac. Abr., tit. Dower, C. So by the common law dower was forfeited by the attainder of the husband for treason: 2 Bla. Com. 130.

We are therefore of opinion that the provisions of the statute under consideration, with reference to the rights of married women whose husbands were living at the date of their enactment, were a legitimate exercise of the power of the legislature.

But we deem it proper to say that we place this decision solely on the ground of legislative power over a subject-matter of public policy, and do not intend to intimate that a widow's right of dower is subject to be defeated or impaired by any other means, such as alienations of the husband (other than such alienations as are authorized by the statute), encumbrances created or suffered by him, or by judicial sales of his real estate as now authorized by law.

The judgment must be affirmed.

INCROATE RIGHT OF DOWER: *Porter v. Noyes*, 11 Am. Dec. 30; *Moore v. Mayor etc. of N. Y.*, 59 Id. 473; *Melinet's Appeal*, 55 Id. 573; *McCrancy v. McCrancy*, 68 Id. 702; *Nicoll v. Ogden*, 81 Id. 311; *Ferry v. Robinson*, 87 Id. 346.

POWER OF LEGISLATURE OVER INCROATE RIGHTS: *Pierce v. Kimball*, 28 Am. Dec. 537; *Melinet's Appeal*, 55 Id. 573; *Ogden v. Rich*, 71 Id. 559; *Clarke v. McCreary*, 12 Snoddes & M. 347.

HOW FAR MARRIAGE RIGHTS MAY BE CONTROLLED: See *Gooken v. Stonington*, 10 Am. Dec. 121, 131, note, and cases cited; *Mellett's Appeal*, 55 Id. 573; *Boston v. Cummins*, 60 Id. 717; *Clark v. Clark*, 34 Id. 165; *Harrison v. State*, 35 Id. 658.

RIGHT OF DOWER NOT PART OF MARRIAGE CONTRACT: *Mellett's Appeal*, 55 Am. Dec. 573.

JONES v. MOSELEY.

[40 MISSISSIPPI, 261.]

PROBATE OF WILL, WHEN OBJECTIONS ARE FILED as soon as the paper is propounded, should not be taken until after the objections are disposed of.

IMPLIED REVOCATION OF WILL cannot be shown by the declarations of the testator, unless a material change appears in his condition, creating new moral duties and obligations. The change must be in material relations, and not in mere sentiment or feeling.

EVIDENCE OF RECONCILIATION TO CHILD INTENTIONALLY OMITTED FROM WILL, and of the dying declaration of the testator that he wanted his children all to be equal, is not admissible to show an implied revocation of the will.

THE opinion states the facts.

R. G. Rives, for the appellants.

By Court, HANDY, C. J. This was an issue of *deviseavit vel non* in the probate court.

Peter E. Spinks, who was appointed executor by the last will and testament of John Spinks, deceased, filed his petition in the probate court for the probate of the will, alleging the due execution of the will propounded, which bore date the 28th of May, 1859, and that the testator died on the 28th of August, 1861. By the will, his estate, real and personal, was to be equally divided between eight of his children, and the appellants, the children of his daughter, Jane Jones, omitting his daughter, Jane C. Moseley, wife of T. G. Moseley, and leaving her nothing. At September term, 1861, Mrs. Moseley and her husband filed their *caveat*, and thereupon an issue was made up to try whether the will propounded was the last will and testament of the testator. This issue was tried at December term, 1861, and the executor introduced the subscribing witnesses, who proved the execution of the will according to the requirements of the statute, and rested the case. The *caveators* then introduced one Oliver, who was admitted against the objection of the executor, and who testified that he was at the house of the deceased a short time before his death, near

his bedside, and had hold of his hand; that deceased said he wanted to talk about his business; that witness asked him what he wanted to say about it, and he then said he wanted his children all to be equal; that witness asked him who he wanted to attend to his business, and he said he wanted his son Peter to attend to it; that witness told him he thought it would all be attended to, and that deceased then said, placing his hand upon his breast, "Peace, peace"; that witness asked him what peace; to which he replied, peace of mind, and that he had no animosity against any one living; that deceased did not, in this conversation, say anything about his will. Also Presley Spinks, who testified that at the time of making this will the deceased was mad with his daughter Jane Moseley, and that during his last sickness or before, he became reconciled to her, and that she waited on him during his last sickness. Also Peter Spinks, the executor, who testified the same in substance as the last-named witness. Also C. K. Hale, who testified the same as the last two witnesses with reference to the feelings of the deceased towards his daughter Jane Moseley; and further, that while the deceased was mad with her, he told witness that he intended to make a will and disinherit her, and that witness advised him to do so. There was also proof that the will was in the law office of Judge Jones, in the town of De Kalb, and that Jones was at the house of deceased a few days before the conversation above stated.

The executor, upon the production of these several witnesses to prove declarations of the deceased made during his last sickness and a short time before his death, objected to their introduction for that purpose, but the objection was overruled; and after the testimony of said several witnesses was delivered, the executor moved to exclude it from the jury, and the several motions were overruled, and the executor excepted.

The court then gave sundry instructions to the jury at the instance of both parties, and the jury returned a verdict against the will. The executor moved to set aside the verdict, and for a new trial; but the motion was overruled, and hence this appeal.

The first error assigned is, that the court regarded the *caveat* and ordered the issue at the time it did, which was at the term at which the will was propounded for probate.

It is said that it was the duty of the court, under the statute (Rev. Code, 484, art. 43), to take the probate of the will immediately on its being presented for that purpose, leaving the

parties to contest its validity by subsequent proceedings. This is a misapprehension of the provisions of the statute. It authorizes the court to proceed immediately to take the probate, but it is not imperative as to the time of doing so. It was never intended that the court should proceed to take the probate, notwithstanding objections to it were regularly filed, as soon as the paper was propounded, or before the matter of probate was proceeded with. For the same statute provides elsewhere for the appointment of an administrator *ad colligendum*, pending a contest about a will, and until probate be granted: Rev. Code, 437, art. 56.

The second assignment is, that the court erred in admitting the testimony of the witnesses in relation to the conduct and declarations of the deceased, and in overruling the motion of the executor to exclude that testimony from the jury after it was given.

It is not alleged that this evidence tended to show a positive revocation of the will; but the purpose for which it was introduced was to show an implied revocation, resulting from an alteration of the circumstances of the testator, by which new moral duties had been devolved on him after the execution of the will, which may be presumed to have caused a change of his intention towards his daughter. If the evidence tended to show such a state of facts in this case, it was properly admitted, otherwise it should have been excluded on the executor's motion. The question, then, is, whether the evidence is of this character, and upon this the whole case depends.

The rule upon the subject of implied revocations in cases of this sort is thus stated in the elementary works, and in the leading cases upon the subject:—

“If the testator's circumstances be so altered that new moral testamentary duties have accrued to him, subsequent to the date of the will, such as may be presumed to produce a change of intention, this will amount to an implied revocation”: 1 Lomax on Executors, 55.

Sir John Nicholl says there must be “such a change in the condition of the deceased, such new obligations and duties, that they raise an inference that a testator would not adhere to a will made previous to their existence, considering it an act of moral duty to revoke that disposition; . . . and if there does not arise such a state of circumstances as to produce new duties, if the change is provided for, there is no reason to presume a revocation”: *Talbot v. Talbot*, 1 Hagg. Ecc. 705.

4 The same learned judge lays down the rule in another case, that there must be "such an alteration of circumstances arising from new moral duties, accruing subsequent to the date of the will, as by necessary implication creates an intention to revoke"; and he further states, with still more precision, that "courts have required that the rule shall have for its basis a change of intention, produced by and to be presumed from some new moral obligation arising after the will is made": *Johnston v. Johnston*, 1 Phillim. 447.

By these rules it is essential that there should be a change in the testator's circumstances, producing new moral duties, after the execution of the will, in order to effect a revocation. This change must be in his condition as affecting the substantial relations of the parties, such as subsequent marriage and the birth of a child or children; a will executed under the mistaken belief that a child not provided for was dead; marriage and the birth of a posthumous child; and the like. In all such cases a moral duty devolves upon the testator, by the happening of the facts stated, to make provision for the support and welfare of the child; which creates the strongest presumption that the testator would not have made the will if he had anticipated that such a state of facts would take place, and hence that it will be presumed he intended that it should not remain in force under such circumstances. But the change must be in material relations, and not in mere matter of sentiment.

No case has been brought to our notice, nor have we been able to find one, where the doctrine of implied revocation has been applied to a case of mere change of feelings by the testator towards a party subsequent to the date of the will without a substantial change of circumstances, producing new obligations; and we think that such a case would not be reconcilable with the principle on which the doctrine rests. It is true that feelings of affection from a parent to a child are a high moral duty, and that a change from feelings of animosity to those of fondness and attachment is highly commendable. But this alone is not such a change of his condition, and such a ground of new obligations and duties, as to come within the principle on which the doctrine is founded; for the alteration of the material condition of the testator is the basis of the rule, and the matter of personal feeling is but a secondary and incidental consideration, which by itself would not justify the application of the doctrine.

In this case there was no alteration of the condition of the testator, except in point of feeling towards his daughter. His duty to aid in her support and comfort, by his bounty, was the same, morally, when he made his will, as when he came to his death-bed. All that the evidence amounts to is, that he had become reconciled to his daughter, and that he said he wanted his children all to be equal,—that is, as to his property,—but never said anything about his will. His declaration about all his children being equal is entitled to no legal force where it appears that the basis on which the principle of implied revocation in such cases is founded is wanting,—namely, a change in the condition of the testator, affecting his duties and obligations to promote her welfare in life, and to aid in her support and comfort. If the basis had been laid showing such a change of duties and obligations after the execution of the will, then his declarations might have been proper and important to show his willingness to respond to those duties and obligations, and an intention to revoke his will: *Johnston v. Johnston*, 1 Phillim. 447; but without such foundation the declarations cannot, in law, have this effect, and are incompetent to show the *animus revocandi*.

We think it clear, therefore, that the evidence was insufficient to establish a revocation of the will, and that the motion to exclude it from the jury should have been sustained. And it follows that the instructions given at the instance of the *caveators* were erroneous, because there was no sufficient evidence to justify them.

Let the judgment be reversed, the verdict set aside, and the case remanded for a new trial.

CONTESTING PROBATE OF WILL: *Wells v. Wells*, 16 Am. Dec. 150; *Sneed v. Bwing*, 22 Id. 41; *Wiloff's Appeal*, 53 Id. 597; *Lucas v. Lucas*, 76 Id. 642; *Duncan v. Duncan*, 76 Id. 699; *Lortaux v. Keller*, 68 Id. 696; *Meyer v. Fayy*, 68 Id. 444, 447, note, and cases cited; *Rumyan v. Price*, 86 Id. 459.

IMPLIED REVOCATION OF WILL: *Graves v. Sheldon*, 15 Am. Dec. 658, 660, note, and cases cited; *Sneed v. Bwing*, 22 Id. 41; *Gains v. Gains*, 12 Id. 375, 377, note, and cases cited; *Bowen v. Johnson*, 61 Id. 110; *Harwell v. Lively*, 76 Id. 656, note, and cases cited; *Young's Appeal*, 80 Id. 513, 516, note, and cases cited.

DECLARATIONS, WHEN INADMISSIBLE TO SHOW REVOCATION: *Dea v. Brown*, 15 Am. Dec. 395; *Malone's Adm'r v. Hobbs*, 39 Id. 263.

SOUTHERN R. R. Co. v. KENDRICK AND WIFE.

[40 MISSISSIPPI, 374.]

EVIDENCE OF SIMILAR ACTS OF NEGLIGENCE PRIOR TO THAT COMPLAINED OF on the part of other employees of a railroad company upon other trains is not admissible in an action against the company for neglect of duty by its employees.

COMMON CARRIERS ARE NOT BOUND TO PUT PASSENGERS OFF at their place of destination as they are bound to deliver goods, but must allow them sufficient time and opportunity to leave the vehicle.

THEY MUST DISTINCTLY ANNOUNCE STATIONS, AND GIVE REASONABLE WARNING AND TIME for passengers to alight; but are not required to warn each passenger personally.

PASSENGERS MUST TAKE NOTICE OF ESTABLISHED CUSTOM OF RAILROADS, and use reasonable care to leave the vehicle and to avoid accidents.

WANT OF ORDINARY CARE BY PASSENGER WILL PRECLUDE RECOVERY.

If a passenger is asleep when the station is properly announced, he cannot recover for being carried past his destination.

CONFLICTING INSTRUCTIONS to the jury are irregular, and should not be given.

EXEMPLARY DAMAGES ARE IN DISCRETION OF JURY IN CASES OF PERSONAL WRONG, and should not be awarded merely for a disregard of public duty, unless the circumstances of the case appear to the jury to justify or require such damages; when the neglect is unattended with circumstances of insult, injury, or suffering caused to plaintiff, vindictive damages should not be allowed. The existence and weight of such circumstances must be determined by the jury, if there is any evidence tending to show them.

JURY MAY CONSIDER SEX OF PARTY INJURED, and the circumstances of peril and suffering undergone, in estimating damages. They may also consider the state, degree, quality, trade, or profession of either party.

INSTRUCTION SHOULD NOT STATE TESTIMONY OF PARTICULAR WITNESS, as what that testimony was is a matter to be determined by the jury.

JURY MAY CONSIDER PECUNIARY MEANS OF DEFENDANT in adjusting the punishment, provided they think the facts proven render it proper to inflict vindictive damages for a disregard of public duty.

GENERAL CHARACTER OF EMPLOYEE for faithfulness cannot shield the employer from liability if the evidence shows negligence and wrong committed by the employee.

SPECIAL DAMAGES cannot be recovered for negligence without proof of special injury or wrong.

NOMINAL DAMAGES may be recovered without proof of special damages when negligence is shown to the wrong of plaintiff.

AMBIGUOUS INSTRUCTIONS which may mislead the jury ought not to be given.

THE opinion states the facts. The third, fourth, and seventh instructions referred to in the opinion as having been given for the plaintiffs are as follows: "3. The law has not intrusted the court with a discretion to estimate damages, but has devolved the power on a jury, as a matter of sentiment and feeling, to be exercised by them according to their sound discretion, duly

weighing all the circumstances of the case, and considering the state, degree, quality, trade, or profession of the party injured, as of him who did the injury"; "4. In estimating damages, therefore, the jury have a right to take into consideration the sex of the plaintiff, the peril in which she was placed, and the mental and physical suffering which she underwent by the act of the defendant"; "7. The jury in assessing damages are to allow not only just compensation for the injury, but to inflict proper punishment on the defendant for the disregard of public duty; and in such a case they may take into consideration in adjusting the punishment the pecuniary means of the defendant."

W. and J. R. Yerger, for the plaintiffs in error.

J. H. Campbell, for the defendants in error.

By Court, *HANDY, C. J.* This action was brought by the defendants in error, to recover damages sustained by the wife by reason of the negligence of the conductor of the railroad train from Meridian to Newton station, in not stopping the train at that station, for which Mrs. Kendrick had purchased a ticket as a passenger, and in failing to give her notice when the train reached there; in consequence of which she was carried about two miles past that place, and the conductor, refusing to take the train back to the station, put her off at the place to which the train had gone, late at night, and placed her under the charge of two strange negro men to be conducted back to the station, she being alone and without a protector; and she was compelled to walk back to the station late at night, over dangerous bridges and almost impassable roads, in great bodily exposure and terror of mind. To this a demurrer was filed, assigning several grounds of objection, all of which were overruled, and we think properly, as they appear to be rather of the nature of pleas in bar than matters of demurrer. An amended declaration was then filed, stating in substance the averments of the original declaration, and alleging further that the conductor was requested to back the train to Newton station, but refused to do so, and compelled Mrs. Kendrick to get off at the place to which the train had gone. To this and the original declaration the defendant pleaded the general issue, and several other pleas amounting to the general issue.

On the trial Mrs. Kendrick was introduced as a witness, and testified in substance that she purchased at Meridian a ticket

for Newton station, took her seat in the car, and gave the ticket to the conductor when he called for it in passing through the train a short time after leaving Meridian; that she was traveling alone and without a protector; that she did not know when the train arrived at Newton station, did not hear any one announce the station, and was carried to a water-tank about a mile and a half beyond that station, and as the train was near that point, she learned by inquiry of a passenger, who inquired of the conductor, that they had passed Newton station; and thereupon that the conductor told her to stand where she was, and he went forward and returned shortly with two negro men with torch-lights, and informed her that they would carry her valise back to the station, and assist her; that he told her it would be dangerous to take the train back to the station; that the negroes went back with her to the station, carrying her baggage; that she and they walked on the track, passed over two pieces of trestle-work, one high with water under it; that she had some difficulty in passing over it, but was assisted by the negroes; that the place where she got off the train was swamp and woods, and she got back to near the station about three o'clock in the morning; that the conductor told her it was half a mile back to the station, and when she got back there she was considerably fatigued; that she went back because she expected her brother to meet her there, and did not know what else to do. On cross-examination she testified that she may have slept some, but very little, if any, while on the train; that at one time when the train stopped she looked up and saw buildings, and supposed it was Hickory station, but now believes it was Newton station; she did not know of the train stopping again until it stopped at the place where she got off; that she did not see the conductor after he received her ticket until she saw him where she got off; that she did not recollect that he proposed to carry her forward until they met the up-train, and to send her back by that train, nor that he said that if she insisted upon it he would back the train to the station, or that he made any proposition to her; that he did not ask her to get off the train, but she got off because she preferred to do so, and did not know what else to do; that the conductor was every way respectful and polite to her, and the negroes were respectful and had good torch-lights; that the conductor assisted her to get off the cars, and she made no objection to getting off and walking back, as she did not know what else she could do; that she was in no way injured,

except the fatigue of walking; that one time, whilst she was walking back, when one of the negroes asked the other for a stick, she felt much alarmed until she saw him put the stick in the handle of the valise, when her alarm ceased.

Doolittle, a witness for the plaintiff, testified that he lives near Newton station, and that Mrs. Kendrick came to his house, as stated by her, some time after midnight; that the tank where the plaintiff got off is about one mile from his house, and that the road intervening passes over swampy ground, there being two trestle-bridges on it, one of which is about fifty feet long.

Maxcy was introduced by the plaintiff, and asked whether he had traveled on the Southern railroad at any time previous to September, 1862, and if the conductor called out the stations at any time whilst he was on the train. To this the defendant objected, but the objection was overruled, and the defendant excepted. The same question was propounded to Wansley and Williams, witnesses introduced by the plaintiff, which was objected to, but the objection was overruled, and the witnesses allowed to answer it, and the defendant excepted. The first witness stated that in May, 1862, and the last two stated that previous to September, 1862, they had traveled from Newton station to Meridian on the road, and did not hear the conductor call out any station between these points.

The defendant then introduced the deposition of Lucy, which states, in substance, that he was the conductor of the train of the railroad when Mrs. Kendrick came on as a passenger from Meridian to Newton station; that she came on board in the night, it being the night train; that the train reached Newton station about one o'clock at night; that on the arrival of the train there the witness had the name of the station announced by one of the brakemen, and it was also announced by himself at the door of the car in which Mrs. Kendrick was, and he stopped the train from seven to ten minutes, longer than the usual time, which is three minutes, because there was freight to be unloaded; that after leaving the station some mile and a half, in going through the cars he recognized Mrs. Kendrick as one of the passengers ticketed for Newton station; that his impression is she was asleep, and he approached and touched her on the shoulder, her face being turned from him, and her head seemed reclining on the back of the seat; that she turned around, and he asked her if she was not to get off at Newton station; she replied: "Yes;

where are we now?" He replied, some mile and a half west of the station. She asked what she was to do, and he told her he was to meet an approaching train some distance west of there, and if she chose to stay aboard of the train until he met that train she could do so, and he would put her on that train and send her back free of charge. She refused to do that; and he then told her there were two trustworthy boys of the road at the water-tank, where they were then about to stop, and he would send them back with her to Newton station with torch-lights if she would accept of it, which she willingly agreed to; that he also informed her that if she required it, he would back the train to Newton station with her, at the same time telling her there was some danger in backing the train with the engine he had, as it might possibly run off the track in backing, but that he did not think it his duty to carry her back, as he had announced the station, but for her accommodation he would do so; that she said she would not require that, and by sending the boys back with her it would be satisfactory; and that was done; that the announcement of the station was made sufficiently loud and distinct for any passenger on the cars to hear it if awake, and long enough to allow them to get off; that it was his impression that if he had backed the train to Newton station there would have been some danger of a collision with the approaching train by being out of time, and that he so told Mrs. Kendrick; and that on the arrival of the train at Newton station he did everything that was usual and customary to notify passengers of the arrival at the station; and the witness was not in the employment of the company when his deposition was taken.

The president of the company testified that the witness Lucy was well known to him, and he was a faithful and competent officer, attentive to his duties, and ever regarded as one of the best conductors on the road; and Judge Watts testified to the same effect.

The first error assigned is the overruling of the demurrer. But the grounds of demurrer set forth are manifestly untenable, and do not appear to be urged here by the counsel for the plaintiff in error.

The second assignment is the admission of the testimony of the witnesses Maxcy, Warnley, and Williams to show that the conductors of the railroad had been negligent in calling out the names of the stations on the road at a time prior to that at which the wrong here complained of was done.

This assignment was well taken. The question was, whether the company, by its agent, was chargeable with neglect of duty at the particular time complained of by the plaintiffs; and it was not competent upon the issue to show negligence at another time, and by other agents of the company. This is settled in the case of *Mississippi Central R. R. Co. v. Miller*, 40 Miss. 45.

The third error assigned is the instructions given by the court at the instance of the plaintiffs, the first of which is in these words:—

“It is the clear duty of common carriers of passengers not only to call out the different stations at which they arrive, and for which they have passengers, but to see that the passengers, with their baggage, are put off at the place of their destination.”

The rule thus stated appears to place the duty of common carriers of passengers upon the same ground as that in relation to goods and other property delivered to them. But there is an essential difference between the duties in the two cases, proceeding from the difference in the nature of the objects to which the duties of the carrier apply. In the case of goods and other chattels, the object is either inanimate, or without reason and volition; is delivered to the carrier, and wholly within his power. It is mainly because he has absolute control over it that he becomes an insurer of it for safe-keeping and delivery, from which nothing will discharge him but casualties by the act of God or of the public enemy, or the undue interference of the owner. But passengers on a public conveyance are of a different nature. They are persons, endowed with volition and capability of rational locomotion. They are not delivered to the keeping of the carrier, but of their own will make use of his vehicle as a means of conveyance, and take their seats for the purpose of being transported from one place to another, co-operating with him in accomplishing the end of the undertaking, which is, to be safely carried to a given place, where it is to be presumed they will be careful to do what is necessary on their part to this purpose. In the case of goods, the obligation is to carry and deliver; as to passengers, it is simply to carry and to allow them sufficient time and opportunity to leave the vehicle. In the latter case, it is presumed that they are desirous and ready to quit at their point of destination, and it is not the duty of the carrier to put them off; because, as rational beings, it is to

be presumed that they will do what they expressly set out to do. A duty therefore devolves on the passenger; and it is to use reasonable care and diligence to leave the vehicle, and to avail himself of the opportunity afforded him by the carrier to do so.

Yet, as passengers must necessarily often travel in such conveyances as railroads to places whose localities are entirely unknown to them, a duty devolves on the carrier, in order to afford them an opportunity to depart at their points of destination, to give notice of the arrival of the trains at such places. The mode of performing this duty by railroads appears to be well established by general custom throughout this country, — to be to announce, in a distinct and audible manner in each car, so that it may be heard by all passengers, the arrival of the trains at each station or fixed place of departure, and then to stop a sufficient length of time to allow the passengers to get off without danger or injury to their persons. And this proceeds upon the reasonable ground that they are vigilant to do their part of the undertaking which they set out to accomplish, and which is only to be done by their own exertion. All that is required of the carrier in such cases is reasonable warning, and such as may be presumed to be sufficient to give notice to those who are careful to do their duty. It would be unreasonable to require personal warning to each individual passenger, because it would require much time to do so in trains much crowded with passengers; it would cause much detention in traveling, which would be a public inconvenience, and it would be to impose a duty on conductors, where there was a long train and many passengers, which it would require an extraordinary memory to perform properly, and which, therefore, would be often omitted through mistake or want of memory. It is better to require something to be done by the passengers, and all that is required by the prevalent custom is, that he shall use reasonable care and vigilance in attending to the business he has undertaken. If he fails to do this, he is chargeable with negligence, which will preclude him of complaining that the carrier has not done his duty.

The particular question presented in this instruction, so far as we have been able to find, has not been adjudged in any of the numerous cases in regard to the duties and liabilities of railroad companies that have arisen in our sister states and in England. But decisions have been made in analogous

cases, founded on principles which appear to be fully applicable to this question.

In *Pennsylvania R. R. Co. v. Kilgore*, 32 Pa. St. 294 [72 Am. Dec. 787], adopted by the supreme court, at page 296 it is said: "We do not think it was the duty of the conductor to go through the train and see that every person was safely passed out of the cars. It was his duty to stop the train sufficiently long to enable them to get out without danger to their persons or lives; and if he did not, he was derelict in his duty." And in numerous cases it is held that it is the duty of the passenger to take reasonable care in order to avoid accidents, and that he cannot recover if it appears that the injury sustained was in any degree caused by his own negligence or want of care: *Murch v. Concord R. R. Corp.*, 9 N. H. 9 [61 Am. Dec. 631]; *Beers v. Housatonic R. R.*, 19 Conn. 566; Redfield on Railways, 330. And if by ordinary care he might have avoided it, he cannot recover: *Id.* And this rule is sanctioned by this court in *Vicksburg and Jackson R. R. v. Patton*, 31 Miss. 192 [66 Am. Dec. 552].

In the excellent work of Mr. Redfield on railways, it is laid down as a rule applicable to the rights and duties of railroad companies and their passengers that the usages of any particular trade, such as are uniform or general, are presumed to be familiar to all persons having transactions in that trade or business": Redfield on Railways, 296. It is certainly the duty of the person dealing with such a corporation as a railroad company to inform himself, if practicable, as to its established usage and custom in relation to the business in which he is concerned. Hence he is presumed to know such usage or custom; and when the same is not contrary to law or the contract of the parties, if the person fails to obtain or to act upon this knowledge, he cannot reasonably complain of an injury that has resulted from his neglect: *St. John v. Van Santvoord*, 6 Hill, 157, per Walworth, Chancellor.

It is absolutely necessary to the proper management of the business of such a company that there should be established rules for the government of their business with those who may be concerned in it; for without them the operations of the company would be embarrassed, if not impracticable; and the company has the power, and must of necessity establish such regulations as are reasonable for the mutual convenience of both parties and not in conflict with law: Redfield on Railways, 28. And it is the duty of persons dealing with them to take notice of such regulations.

It is manifest that the instruction under consideration is in opposition to these views, and could scarcely have failed to mislead the jury in considering the evidence before them. Without expressing any opinion as to the weight of that evidence, it is proper to say that there was evidence before them tending to show that the station was properly announced by the conductor, and that Mrs. Kendrick was asleep at the time, and therefore did not hear it; and if the jury believed this testimony their verdict could not properly have been for the plaintiffs. But under the rule stated in this instruction, it was immaterial whether the jury believed this to be the state of the facts or not, and they were nevertheless bound to find for the plaintiffs. The instruction was therefore material to the facts in evidence, and was erroneously given.

This error was not obviated by the fourth instruction given at the instance of the defendant, in these words: "If the jury believe from the evidence that the cars stopped at Newton station the usual length of time, and the station was announced, then the railroad company are not liable for the plaintiff's failure to get off, and they will find for the defendant."

It is remarkable that this instruction states a rule in direct opposition to that stated in the first instruction given for the plaintiffs, and we are unable to perceive upon what principle the learned judge in the court below could have stated such opposite rules to the jury in the same case. The jury were left to determine which of the two contrary rules they would follow; and it would appear that they adopted the one which is erroneous. It was not only error to give the first instruction, but it was irregular to give conflicting instructions, and thereby, in effect, leave the jury without instruction to guide them with reference to a material question of law arising upon the evidence in the cause.

The second instruction for the plaintiffs is as follows: "In the assessment of damages, the jury are allowed, and indeed it is their duty, in such cases as that of public carriers, where the law provides no other penalty, to consider the interest of society as well as justice to the plaintiff, and by their verdict, whilst they make just compensation for the private injury, also to inflict proper punishment for the disregard of public duty."

This instruction was doubtless intended to be taken from what is said by this court in *New Orleans, Jackson, & G. N. R. R. v. Hurst*, 38 Miss. 666 [74 Am. Dec. 785]. But the rule stated in that case has reference only to cases of personal

wrong and injury which the jury considered of such a character as in their judgment to call for the imposition of exemplary damages; and it holds that if they so considered it from the evidence, it was their right and duty in such cases to find such damages. There is no such qualification in this instruction, but it directs the jury that in suits against public carriers it was their duty to make just compensation for the private injury, and also to inflict proper punishment for the disregard of public duty, in their assessment of damages. Under this rule, the jury were bound to find punitive damages if they found a verdict against the railroad, although they might have considered that the circumstances of the case did not justify or require such damages. It took away the proper discretion over the subject which is the peculiar province of the jury; and the instruction in its broad terms was clearly wrong.

The third instruction is in the language of this court in the case last cited, and was properly given, and the fourth is but the legitimate deduction from it.

In the sixth, the court instructs the jury that if they believe the testimony of Mrs. Kendrick, and then proceeds to state what that testimony was, they might find vindictive damages. This was erroneous in stating to the jury what the testimony of Mrs. Kendrick was, that being a matter to be determined entirely by their judgment. It should also have contained terms of qualification, that vindictive damages might be found if in their judgment they thought that the facts as shown in evidence rendered it proper to do so; and the same qualification should have been added to the seventh instruction.

The ninth instruction is in these words: "Any failure to discharge all the duties imposed by the nature of the office of common carrier amounts to gross and willful misconduct, for which punitive damages may be given; and the fact that the general character of the conductor was that of faithfulness can in no manner shield the company where a positive wrong has been done."

The first branch of this instruction is manifestly wrong; for it is not every failure to discharge all the duties imposed by the nature of the office of the carrier that will constitute gross and willful misconduct for which punishment may be inflicted in damages. Whilst it is true that the utmost diligence is required of them in the performance of their duties, there may be cases of failure to do everything incumbent on them which, under the special circumstances, might be partially excusable,

and would clearly not show gross and willful misconduct in fact, or which, from the slight and immaterial nature of the wrong resulting from them, would not justify punitive damages. For example, if the taking of the plaintiff beyond Newton station was unjustifiable under the circumstances, and upon the discovery of it by the conductor he had backed the train to the station with but little delay to the plaintiff, that would have been a failure to discharge his duty; but it could scarcely be said to be a case of gross and willful misconduct for which punitive damages should be inflicted for the wrong.

A neglect of duty clearly not attended with any circumstances of insult, of aggravation of feelings, of injury to the person or his property, or of bodily or mental suffering, would not justify vindictive damages; yet if there be any evidence tending to show such circumstances, its weight and force rest peculiarly in the discretion of the jury, whose verdict, either in point of determining the existence and weight of such facts, or in awarding damages for the wrong, will not be disturbed, except when it clearly appears that they are not warranted by the evidence.

In the present case we do not intend to express any opinion as to whether the evidence was or was not sufficient to sustain a verdict of exemplary damages; but we intend merely to say on this point, that, as a general proposition, the rule stated in the instruction is too broad.

That part of the instruction relating to the character of the conductor was correct, provided the jury should be of opinion that the evidence was sufficient to show negligence and wrong on the part of the conductor, under the rules above stated in considering the first instruction.

By the fifth instruction the court instructed the jury that in actions of tort against common carriers special damage need not be proved. This was improper, because it was indefinite, and calculated to mislead the jury. If it be understood as holding that when there appears by the evidence to be negligence in the carrier to the wrong of the plaintiff, in such case the plaintiff is entitled to recover nominal damages without proof of special damage; to that extent the rule was correct. But if it be taken to hold that when the carrier has been guilty of negligence the plaintiff may recover special or exemplary damages, without any evidence tending to show circumstances of special injury or wrong, it was error; and the

instruction was calculated to be understood in this latter sense by the jury, and therefore should not have been given.

It is not necessary or proper to consider the assignment in relation to the motion for a new trial on the ground that the verdict was contrary to the evidence. Since the evidence will again be presented to a jury on a new trial, to be weighed and considered by them, under proper instructions to be given by the court, it is not proper that we should say anything now that will prevent their free judgment upon the evidence.

For the errors above stated, the judgment is reversed, the verdict set aside, and the cause remanded for a new trial.

EVIDENCE OF SIMILAR ACTS OF NEGLIGENCE, WHEN NOT ADMISSIBLE: See *Miss. Central R. R. Co. v. Miller*, 40 Miss. 45; *Wentworth v. Smith*, 82 Am. Dec. 228; *Robinson v. Fitchburg & W. R. R.*, 7 Gray, 92; *Gahagan v. Boston & L. R. R. Co.*, 79 Am. Dec. 724, 727, note, and cases cited.

COMMON CARRIERS MUST ANNOUNCE STATIONS, AND GIVE TIME TO ALIGHT: *Heirn v. McCaughan*, 66 Am. Dec. 588, 603, note, and cases cited; *Penn. R. R. Co. v. Aspell*, 62 Id. 323, 327, note, and cases cited; *Penn. R. R. Co. v. Kilgore*, 72 Id. 787; *Commonwealth v. Power*, 41 Id. 480, note, and cases cited.

PASSENGERS ARE BOUND TO ORDINARY CARE: *Laing v. Colder*, 49 Am. Dec. 533; *Ingalls v. Bills*, 43 Id. 346, 364, note, and cases cited; *Penn. R. R. Co. v. Aspell*, 62 Id. 323; *Chicago, B., & Q. R. R. Co. v. Dewey*, 79 Id. 374; *Damont v. N. O. & O. R. R. Co.*, 61 Id. 214; *Galena and Chicago Union R. R. Co. v. Fay*, 63 Id. 323; *Gavett v. Manchester etc. R. R. Co.*, 77 Id. 422; *Todd v. Old Colony etc. R. R. Co.*, 80 Id. 49; *Spencer v. Milwaukee R. R. Co.*, 84 Id. 758.

PASSENGERS MUST TAKE NOTICE OF ESTABLISHED CUSTOMS AND RULES: *Cheney v. Boston & M. R. R. Co.*, 45 Am. Dec. 190, 193, note, and cases cited; *Commonwealth v. Power*, 41 Id. 481, note, and cases cited.

EXEMPLARY DAMAGES, WHEN ALLOWABLE IN DISCRETION OF JURY: *Heirn v. McCaughan*, 66 Am. Dec. 588; *Ohio & Miss. R. R. Co. v. Tindall*, 74 Id. 259; *Smithwick v. Ward*, 75 Id. 98; *Windham v. Rame*, 73 Id. 116; *McCoy v. Lemon*, 70 Am. Dec. 246; *Peoria Bridge Ass'n v. Lewis*, 71 Id. 263, 266, note, and cases cited; *Hagan v. Providence etc. R. R. Co.*, 62 Id. 379, note, and cases cited; *Austin v. Wilson*, 50 Id. 766, 768, note, and cases cited; *Milburn v. Beach*, 55 Id. 91; *Rowe v. Moses*, 67 Id. 560, 562, note, and cases cited.

WHEN EXEMPLARY DAMAGES NOT PROPER: *Wardrobe v. Cal. Stage Co.*, 68 Am. Dec. 231; *Black v. Carrollton R. R. Co.*, 63 Id. 586; *Taber v. Hutson*, 61 Id. 96, 100, note, and cases cited; *Heil v. Ghanding*, 82 Id. 537.

WHAT JURY MAY CONSIDER IN ESTIMATING DAMAGES. — Pecuniary ability of defendant: *Grable v. Margrave*, 38 Am. Dec. 90, note, and cases cited; *Myers v. Malcomb*, 41 Id. 747; *Rowe v. Moses*, 67 Id. 562, 566, note, and cases cited. Condition, circumstances, and suffering of plaintiff: *Stockton v. Fry*, 45 Id. 138; *Heirn v. McCaughan*, 66 Id. 588; *Cooper v. Mulkins*, 76 Id. 638; *Taber v. Hutson*, 61 Id. 96, 101, note, and cases cited. Business capacity or occupation and earnings of injured party: *Tilley v. Hudson River R. R. Co.*, 86 Id. 297; *Donaldson v. Mies etc. R. R. Co.*, 87 Id. 391; *Rowe v. Moses*, 67 Id. 567, note, and cases cited.

NOMINAL DAMAGES FOR NEGLIGENCE OR TORT PRESUMED WITHOUT PROOF OF SPECIAL DAMAGE: *Lafin v. Willard*, 26 Am. Dec. 629; *Hillebrand v. Brewer*, 55 Id. 757; *Nicholson v. New York etc. R. R. Co.*, 56 Id. 390; *McConnel v. Kibbe*, 85 Id. 265.

CONFLICTING INSTRUCTIONS: See *Hickman v. Green*, 34 Am. Dec. 124; *Farish & Co. v. Reigle*, 62 Id. 666; *Pomroy v. Parmlee*, 74 Id. 328; *Horne v. State*, 81 Id. 499; *Adams v. Capron & Co.*, 83 Id. 566.

INSTRUCTIONS, WHEN ERRONEOUS FOR STATING OR CONSTRUING EVIDENCE: See *Sidwell v. Burns*, 21 Am. Dec. 387; *Wood v. Chambers*, 70 Id. 382; *State v. Whit*, 72 Id. 533, 541, note, and cases cited.

AMBIGUOUS OR MISLEADING INSTRUCTIONS: See *Sumner v. State*, 26 Am. Dec. 561; *Reeves v. Delaware etc. R. R. Co.*, 72 Id. 713.

THE PRINCIPAL CASE IS CITED IN *M. & C. R. R. Co. v. Whitfield*, 44 Miss. 491, and held not to announce a new rule of damages, nor to overrule previous decisions. The court say (page 496): "The case may be cited as one in which, to the careless reader, the characteristics of the two classes of cases, viz., cases of punitive and compensatory damages, are partially blended, and the injuries which may be rightfully considered as proper subjects of compensation are classed as punitive in their character. Examined with these suggestions in view, the case cannot be considered as exceptional, but in perfect accord with the current of adjudications on this subject." The principal case is cited with approval in *Thompson v. N. O. J. & G. N. R. R. Co.*, 50 Miss. 319, to the point that special or exemplary damage cannot be recovered without proof of special injury or wrong, but that nominal damage may be recovered for negligence without proof of special damage. In the case of *Chicago Railroad Co. v. Scurr*, 59 Id. 463, the rule of the principal case in regard to the allowance of exemplary damages is quoted with approval, and the court say: "We are prepared to go a step further, and say that in any and all actions for damage, where the proof fails to show anything that will warrant an imputation of willfulness, recklessness, or rudeness, it is the duty of the court to inform the jury, when requested to do so, that they cannot inflict punitive damages. Not to do so, in a case free from doubt, would be an abdication of judicial authority, and a permission to the jury to violate the settled principles of law."

WEATHERSLY v. WEATHERSLY.

[40 MISSISSIPPI, 462.]

MORTGAGE IS DISTINGUISHED FROM CONDITIONAL SALE by the right of redemption after the time limited for payment until barred by limitation. A conditional sale becomes absolute if the condition is not strictly performed within the time limited.

INTENTION OF PARTIES AT TIME OF CONTRACT GOVERNS in determining whether a transaction is a mortgage or a conditional sale. If then intended as a mortgage, or security for a debt, it will remain such always, and the parties cannot agree that it shall be irredeemable. Such stipulation will not be enforced in equity, though made a part of the contract of security.

IF RELATION OF DEBTOR AND CREDITOR SUBSISTS, the transaction is a mortgage, and not a conditional sale. If no debt exists, or if it is extinguished,

and the grantor has the privilege of refunding to obtain a reconveyance, it is a conditional sale.

BILL OF SALE GIVEN TO SECURE INDORSEER, accompanied by a separate written agreement that the property shall belong to the indorser if he is compelled to pay the note indorsed, is a mortgage, and not a conditional sale. A subsequent verbal change in the agreement, whereby the money is directly advanced under a promise of repayment, will not alter the nature of the transaction.

THE opinion sufficiently states the facts.

O. R. Potter and W. C. Harper, for the appellant.

Fulton Anderson and John D. Freeman, for the appellee.

By Court, **HARRIS, J.** Appellee filed his bill in the superior court of chancery to redeem certain slaves alleged to have been mortgaged by him to appellant. The bill charges that on the 2d of December, 1833, it was agreed between the parties that complainant was to convey the slaves to appellant, and appellant was to indorse the note of complainant for two thousand eight hundred dollars, payable at the Agricultural Bank, and to indorse the same on renewal, and that if appellant should be compelled to pay the same, then the slaves should be, to all intents and purposes, the property of appellant. Exhibits A and B contain the agreement relied on as a mortgage. The bill states that soon after the execution of these papers the negroes were delivered to appellant, who had since held them. That the note was not discounted by the Agricultural Bank, as expected; but admits that appellant procured for complainant two thousand eight hundred dollars from another bank, on appellant's own bill, accepted by a friend, which sum complainant has never repaid.

The answer of appellant admits the execution of exhibits A and B; says that complainant wished to raise money, and applied to appellant to indorse the note for two thousand eight hundred dollars, that complainant might borrow the money thereon from the Agricultural Bank, and proposed to execute said writings (A and B), with the perfect and explicit understanding and agreement that if appellant should have the said money to pay, the said negroes and their increase should be absolutely the property of appellant, and complainant should be discharged from all further liability to appellant on account thereof; that said writings (A and B) were not intended by these parties to operate as a mortgage, but as a conditional sale, and the slaves were thereupon placed by

complainant in appellant's possession; the appellant indorsed said note, but the Agricultural Bank refused to discount it. Complainant and his friends then tried to raise the money in another way, and prevailed upon Eli Montgomery to accept a bill drawn by appellant, on which the money was raised from the Planters' Bank, and paid over to complainant by appellant without the name of complainant, but on the credit of appellant and his friends.

Appellant drew said bill at the request of complainant, and procured the money thereon on his promise that if the Agricultural Bank finally discounted the note first above referred to (and which had been left there for that purpose), the money should at once be applied to pay said bill; and the express agreement was, that appellant should hold the slaves in the same way under said agreements (A and B) as if the money had been procured on said original note; said note was never discounted, and complainant never paid said bill, but refused to do so. The answer then sets up acts and declarations of complainant tending to show that he regarded the transaction as a sale, and not a mortgage; and finally insists that if the original transaction be held as a mortgage, that complainant, by his acts and declarations and refusal to redeem, should be regarded as having waived and abandoned his right of redemption; relies on his long possession of the negroes; and pleads the statute of limitations.

The deposition of Eli Montgomery, taken in a former suit, and read in this by consent, proves that appellant got the money for complainant; that complainant agreed to meet the bill; that appellant repaid him (witness) the money so advanced on said bill. He also proves that complainant urged appellant to take the negroes he had mortgaged, as it would be ruinous for him to redeem; he heard this on several occasions. Appellant was exceedingly anxious that he should redeem them, and was importunate on that subject.

The deposition of Norman shows an understanding between complainant and appellant that appellant was to pay at least "three" bales of cotton for the hire of said negroes,—this is drawn from a conversation between them in 1852.

The deposition of Sheil construes the agreements A and B, and decides them to constitute an absolute sale; proves conversations between the parties in relation to the "repurchase" of said slaves. He proves a proposition by appellant to complainant to take the negroes back, and pay appellant the

money he had to pay out for them; and on making this proposition, appellant gave as a reason for it that the amount, two thousand eight hundred dollars, was more than he wanted to invest in slaves at that time. To this proposition he testifies that complainant acceded, saying that he would do as George proposed.

Upon this state of facts, a decree was rendered in the court below in favor of complainant for redemption, and for him from the 2d of December, 1833, to the date of decree, except certain of said negroes which had been sold by complainant, or for his debts under execution against him. The decree appoints a commissioner to take an account, with directions in relation thereto, and in case a balance is found due appellant, a decree of foreclosure and sale be entered, reserving all other matters, etc.

From this decree the appeal is prosecuted here.

We deem it unnecessary to notice the first, second, and fifth grounds of error assigned further than to say that the first presents an immaterial matter, not to the prejudice of appellant. The second is not well taken because the record and proceedings of the superior court of chancery, filed as exhibits in this case, were properly before the court for the purpose of showing complainant's right to further prosecute this suit within the time limited by the statute. The fifth ground of error assigned is a mistake in point of fact. The third, fourth, and sixth assignments all relate, first, to the true construction of the agreements A and B upon their face, and in connection with all the testimony in the cause tending to show what was the original intention of the parties; and second, to the point that the testimony shows a waiver or abandonment of all right to the property in dispute by the complainant.

The difference between a mortgage and a conditional sale is striking and important. In the mortgage, though the time of payment be past, there is yet an equity of redemption, which, unless sooner foreclosed, will continue until barred by the statute of limitations: *Robertson v. Campbell*, 2 Call, 428. But in the case of a conditional sale, if the condition of payment is not strictly performed at or before the time limited, the right is gone forever, and there is no subsequent power of redemption: *Chapman v. Turner*, 1 Id. 292 [1 Am. Dec. 514].

To ascertain whether the agreements A and B were designed as a mortgage or conditional sale, the authorities hold that we are to look to the intention of the parties at the time of the

making of the contract: *Thomson v. Davenport*, 1 Wash. (Va.) 126; Powell on Mortgages. If it was intended as a mortgage, courts of equity will not suffer it to be converted into an absolute or conditional purchase by any form of words: *Thomson v. Davenport*, *supra*; Tucker's Lectures, p. 101. The intention which we are to investigate is, whether the parties designed a purchase and sale on the one hand, or a borrowing and lending on the other; whether they were treating of an absolute or conditional sale, or of the loan or procurement of money on security by the conveyance of property. If the transaction show that it was designed to borrow money upon a security therefor, nothing can divest it of the equity of redemption, for it is a mortgage; and if a mortgage, not even the agreement of the parties that it shall be irredeemable would control or change the rule in equity: Tucker's Lectures, pp. 101, 102, and cases cited; 1 Fonbl. Eq., p. 267; *Thomson v. Davenport*, 1 Wash. (Va.) 126; *Chapman v. Turner*, 1 Call, 280 [1 Am. Dec. 514]; *Ross v. Norvell*, 1 Wash. (Va.) 17 [1 Am. Dec. 422].

In the case of *Robertson v. Campbell*, 2 Call, 421, Judge Pendleton says: "It must often happen that there will be a difficulty in drawing the line [distinction] between these two sorts of conveyances. The great *desideratum* which this court has made the ground of their decision is, whether the purpose of the parties was to treat of a purchase, the value of the commodity contemplated, and the price fixed, or whether the object was a loan of money, a security or pledge for its repayment." See also *Roberts v. Cocke*, 1 Rand. 121.

In this state, the rule has been stated as follows: "A deed absolute on its face will be held valid and effectual as a mortgage, if it clearly appear that it was designed by the parties thereto to operate as a security for the repayment of money": *Prewett v. Dobbs*, 13 Smedes & M. 440; see 4 Kent's Com., 9th ed., pp. 158-160, and cases cited in notes.

In *Hooper v. Bailey*, 28 Miss. 329, this court says that when the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage. But if the debt be extinguished by the agreement of the parties by the execution of the conveyance, and the grantor has the privilege of refunding, and to entitle himself to a reconveyance thereby, it is a conditional sale.

Tested by these rules, it is clear that the agreement in the case before us (exhibits A and B), whether regarded by themselves, or in the light of all the testimony bearing on the transaction in the record, must be regarded as a mortgage.

The parties did not contemplate a sale; there was no agreement of their minds, nor even a suggestion as to the value of the negroes, or any price fixed. The complainant wanted to borrow on long time two thousand eight hundred dollars; and that was the sum raised for him, without reference to the price or value of the negroes. At the time agreements A and B were entered into, and for four months afterwards, there was no indebtedness existing between these parties for which or upon which a contract of sale could have been based. When they made these agreements, they were made in reference to the arrangement for borrowing money upon complainant's own note, with appellant as his indorser, and these papers were designed as security to him as indorser, and had no other consideration or aspect. The money could not be obtained on this note, and appellant and his friends borrowed the money from the Planters' Bank on their own names, without complainant's name, and with the understanding with complainant that if he should finally get the money from the Agricultural Bank on his own note, that the amount should be applied to the payment of appellant's bill in the Planters' Bank; and that at all events appellant would pay the two thousand eight hundred dollars borrowed for his use from the Planters' Bank back at the maturity of the bill; and to indemnify appellant, and secure this object, the bill of sale and agreement A and B were retained by appellant as a security for that purpose.

Exhibit B is an ordinary bill of sale for the negroes in dispute. Agreement A stipulates for the execution of this bill of sale to appellant, for the negroes by name, by complainant; and appellant, on his part, thereby agrees to indorse complainant's note to the Agricultural Bank for two thousand eight hundred dollars, and also renew indorsement for twelve months longer, when the first shall fall due. They further agree that if the note should not be renewed when it becomes due, and appellant shall be compelled to pay it, then the negroes conveyed by the bill of sale to appellant shall be taken and considered, to all intents and purposes, the property of appellant; and should said note, after renewal, be paid by appellant after it falls due, then title of said negroes to be vested and forever remain in the said appellant.

In effect, these two instruments constitute a mortgage, with a stipulation that it shall be irredeemable; or in other words, that upon default of the mortgagor to pay his liability, or re-

lieve his indorser or security, the title to said negroes shall become vested and forever remain in the mortgagees, and become his absolute property.

This agreement, we have already seen, will not be enforced in a court of equity. Chancellor Kent, in his Commentaries, vol. 4, p. 177, says: "The equity of redemption grew in time to be such a favorite with courts of equity, and was so highly cherished and protected, that it became a maxim, that 'Once a mortgage, always a mortgage.'"

The object of the rule is to prevent oppression; and contracts made with the mortgagor to lessen, embarrass, or restrain the right of redemption are regarded with jealousy, and generally set aside as dangerous agreements, founded in unconscientious advantages assumed over the necessities of the mortgagor. He says the doctrine was established by Lord Nottingham in 1681, in *Newcomb v. Bonham*, 1 Vern. 7; S. C., 1 Id. 232; 2 Vent. 364. The same doctrine was pursued in *Howard v. Harris*, 1 Vern. 190, and it pervades all the subsequent and modern cases on the subject, both in England and in this country: See note *a*, and cases cited; and *Baxter v. Child*, 39 Me. 110; *Waters v. Randall*, 6 Met. 479. There is nothing in the facts of this case, as shown by the witnesses, which can affect the application of these views and principles to the agreements A and B before us. They detail some loose conversations, sometimes denoting these agreements as mortgages, sometimes as a sale; but certainly, in both cases, referring to their construction of the agreement, as contained in these writings, without regard to their legal effect. There is no pretense that these conversations, declarations, or propositions ever amounted to a new contract, upon sufficient consideration, to change or in any manner defeat the legal operation of the writings A and B. They must therefore be treated as a mortgage with the right of redemption.

Let the decree be affirmed.

CONDITIONAL SALE DISTINGUISHED FROM MORTGAGE by strict requirement of payment: *Hickman v. Cantrell*, 30 Am. Dec. 396; *Munsterlin v. Birmingham*, 34 Id. 402.

STIPULATIONS LIMITING RIGHT OF REDEMPTION of mortgaged property are void in equity: *Youle v. Richards*, 23 Am. Dec. 722; *Williamson v. Outpepper*, 50 Id. 176; *Bayley v. Bailey*, 5 Gray, 610; *Willels v. Burgess*, 34 Ill. 475; *Baxter v. Child*, 39 Me. 110; *Plato v. Roe*, 14 Wis. 453; *Hobridge v. Gillespie*, 2 Johns. Ch. 30; *Stover v. Bounds*, 1 Ohio St. 107; *Price v. Parry*, 1 Freem. Ch. 258.

ONCE MORTGAGE ALWAYS MORTGAGE: *Youle v. Richards*, 23 Am. Dec. 722; *Newcomb v. Bonham*, 1 Vern. 8; *Seton v. Skade*, 7 Ven. 273.

INTENTION TO SECURE INDEBTEDNESS BY CONVEYANCE OR BILL OF SALE CRITERION OF MORTGAGE: *Wilcox v. Morris*, 3 Am. Dec. 678; *Dunham v. Dey*, 8 Id. 282; *Edrington v. Harper*, 20 Id. 145; *Dabney v. Green*, 4 Id. 503; *Hickman v. Cantrell*, 30 Id. 396; *Washburn v. Merrills*, 2 Id. 59; *Youle v. Richards*, 23 Id. 722; *Friedley v. Hamilton*, 17 Id. 638; *Reading v. Weston*, 18 Id. 89; *Munnerlin v. Birmingham*, 34 Id. 403, note, and cases cited; *Turnipseed v. Cunningham*, 50 Id. 190, 195, note, and cases cited; *Nugent v. Riley*, 35 Id. 355; *Chase's Case*, 17 Id. 277, 300, note, and cases cited; *Bennet v. Holt*, 24 Id. 455; *Hall v. Saull*, 54 Id. 485; *Moore v. Madden*, 46 Id. 298; *Bigelow v. Topfiff*, 60 Id. 264; *Nichols v. Reynolds*, 36 Id. 238; *Eliland v. Radford*, 42 Id. 610; *Williamson v. Culppepper*, 50 Id. 175; *Hyndman v. Hyndman*, 46 Id. 171; *Stephens v. Sherrod*, 55 Id. 776; *De Wolf v. Strader*, 79 Id. 371; *Slowey v. McMurray*, 72 Id. 251, 257, note, and cases cited; *Fowler v. Stoneum*, 62 Id. 490.

AGREEMENT TO RESELL, WHEN CONSTRUED AS CONDITIONAL SALE: *Critchler v. Walker*, 4 Am. Dec. 576; *Edrington v. Harper*, 20 Id. 145; *Chapman v. Turner*, 1 Id. 514, 519, note, and cases cited; *Barrett v. Pritchard*, 13 Id. 449; *Bennet v. Holt*, 24 Id. 455; *Reading v. Weston*, 18 Id. 89; *Baxter v. Willey*, 31 Id. 623; *Munnerlin v. Birmingham*, 34 Id. 402, 403, note, and cases cited; *Moss v. Green*, 34 Id. 731; *King v. Kinsey*, 36 Id. 40; *Stratton v. Sabin*, 34 Id. 418; *Eliland v. Radford*, 45 Id. 610; *Slowey v. McMurray*, 72 Id. 251, 257, note, and cases cited.

VASSER v. HENDERSON.

[40 MISSISSIPPI, 512.]

CREDITOR'S BILL TO SUBJECT EQUITABLE ASSETS, or choses in action, to the payment of a debt, will not lie until the creditor has obtained a judgment at law upon the debt, and execution thereon is returned *nulla bona*.

JUDGMENT CREDITOR MAY SET ASIDE FRAUDULENT CONVEYANCE which prevents the legal lien of the judgment from operating upon the property, without the return of execution *nulla bona*. The creditor need only proceed at law so far as to obtain a complete title, and a judgment which acts as a lien upon the property sought to be charged would be sufficient.

INSOLVENCY OF CO-JUDGMENT DEBTORS NEED NOT BE AVERRED in a bill to set aside a fraudulent conveyance of one insolvent judgment debtor, if execution has been levied upon the property fraudulently conveyed. To justify such levy, it is not necessary to show that there is no other property which cannot be levied upon. Though property fraudulently conveyed may be sold under execution at law, yet equity will not require the creditor to sell a doubtful or obstructed title, but will set aside the conveyance, and remove the obstruction to a fair sale.

THE opinion states the facts.

Dowd and Sykes, for the plaintiff in error.

Rogers and Beckett, for the defendant in error.

By Court, ELLETT, J. The plaintiff in error, on the 28th of February, 1860, filed a bill in the chancery court of Monroe County against George W. Henderson and others, alleging that on the 28th of May, 1858, he had recovered a judgment against the defendant in error, Henderson, and F. M. Rogers and R. H. Dalton, for \$765.25, which remained wholly unpaid.

That on the 27th of May, 1857, said Henderson had conveyed certain slaves to said F. M. Rogers, in trust for said Henderson's wife; that the said Henderson was insolvent at the time, and that the said conveyance was voluntary and without consideration, and was made to hinder, delay, and defraud his creditors; that the pretended considerations expressed in the said conveyance had no existence; that the slaves remained in the possession of said Henderson until after the death of his wife, when the defendant T. L. Rogers was appointed guardian of his children, and took the slaves into possession; that plaintiff in error, on the 29th of October, 1859, sued out execution upon said judgment, and there being no other property on which a levy could be made, said execution was levied on said slaves, but no sale has been made, on account of the cloud and encumbrance on the title created by the said deed from Henderson to F. M. Rogers, on account of which nothing could have been realized by a sale. The bill prays that the said deed may be declared fraudulent and void, and for other relief.

The defendant demurred to the bill for several causes, all amounting in effect to this, to wit: that as complainant did not allege the insolvency of F. M. Rogers and R. H. Dalton, two of the defendants to the original judgment at law, there was an adequate remedy at law, and no necessity to resort to equity for relief.

The court sustained the demurrer, and dismissed the bill, from which decree the complainant brought this writ of error.

It is universally agreed that a creditor cannot go into a court of equity to subject equitable assets or choses in action not subject to be taken upon execution to the payment of his debt until he has first obtained judgment at law upon his debt, and issued execution, and had a return of *nulla bona*: *Farned v. Harris*, 11 Smedes & M. 366; *Brown v. Bank of Mississippi*, 31 Miss. 458.

And where property legally liable to execution has been fraudulently conveyed or encumbered, the application to chan-

very is to remove an obstruction which prevents a legal lien from operating upon the property, and in such case the better opinion seems to be that the creditor need only proceed at law to the extent necessary to give him a complete title, and that a judgment which acts as a lien upon the property sought to be charged would be sufficient: *Hilzheim v. Dane*, 10 Smedes & M. 556; *Berryman v. Sullivan*, 13 Id. 65; *Fowler v. McCartney*, 27 Miss. 509; *Snodgrass v. Andrews*, 30 Id. 472 [64 Am. Dec. 169]; 1 Am. Lead. Cas. 49, 84; notes to *Sexton v. Wheaton* and *Salmon v. Bennett*, and cases cited.

Conveyances of property made with intent to hinder, delay, or defraud creditors are declared by the statute of frauds to be "clearly and utterly void" as against the creditors affected by them. The right of the judgment creditor to levy his execution upon property so conveyed, and to proceed at law to subject it to sale for the satisfaction of his debt, cannot be denied, without any reference to the question whether the debtor possesses other property, or whether there are other defendants having property liable to the same judgment. In other words, it is not necessary, in order to justify the levy of an execution upon property fraudulently conveyed, that the plaintiff should show, or that the fact should exist, that neither the party who has made such conveyance, nor his co-defendants in the judgment, have other property upon which a levy can be made. We do not mean to say that every voluntary conveyance is a fraudulent one within the meaning of the statute. The plaintiff making a levy on the property undertakes the responsibility of showing that upon the circumstances of the particular case the transaction is one which the law will not sanction.

In the present case, the levy has been made on the property alleged to have been fraudulently transferred, and the plaintiff comes into a court of equity to have the conveyance set aside as a cloud or encumbrance upon the title, preventing a sale of it for its value. The right to do so seems to be clear; for although the property might be sold in its present situation on the execution at law, yet equity will not require the creditor to sell a doubtful or obstructed title at law, but will set aside the conveyance and remove the obstructions to a fair sale: *Fowler v. McCartney*, 27 Miss. 509; 1 Am. Lead. Cas. 84.

The demurrer admits the fraud charged in the bill, and in our opinion ought to have been disallowed, and the defendants required to answer. The decree will therefore be reversed, and the cause remanded for such proceedings in the court below,

in conformity with this opinion, as under present circumstances may be advised.

CREDITOR'S BILLS: See *Massey v. Gorton*, *ante*, p. 237, note, and cases cited, for a full discussion of this subject.

PROPERTY FRAUDULENTLY CONVEYED MAY BE SOLD UNDER EXECUTION as the property of the grantor, the conveyance being void as to creditors: *Stewart v. McMin*, 39 Am. Dec. 115; *Spindler v. Atkinson*, 56 Id. 755; *Dunnican v. Coy*, 69 Id. 420.

THE PRINCIPAL CASE IS CITED with approval in *Fleming v. Grafton*, 54 Miss. 89, to the point that "where property has been fraudulently conveyed, the court of equity will intervene in aid of the legal right, without issue and return of execution, when the lien of the judgment subsists. But the judgment creditor must show a specific right, — that is, a lien on the land, — before he has established a title to relief in equity to displace the fraudulent conveyance." In *Partee v. Matthews*, 53 Id. 148, the distinction taken in the principal case between the mode of reaching equitable and legal assets is approved.

MAGEE v. McNIEL.

[41 MISSISSIPPI, 17.]

LAST WILL AND TESTAMENT IS INOPERATIVE AND VOID where its existence is made to depend upon a contingent event, which comes to pass.

DECLARATIONS OF TESTATOR ARE INCOMPETENT AS EVIDENCE to add to, explain, or in any manner control the construction of a will.

EVIDENCE AS TO CONDITION OF MIND OF TESTATOR AFTER MAKING HIS WILL, which depends for its existence and operation on the non-happening of an event which comes to pass, is irrelevant, and should be excluded.

CONSTRUCTION AND EFFECT OF WILL ARE QUESTIONS OF LAW FOR COURT, and not matters of fact for the determination of the jury. Whether a paper offered in evidence is testamentary in its character, or whether it is to take effect absolutely, or only on condition, is to be determined by proper instructions of the court to the jury.

PETITION to contest the validity of a will. The opinion sufficiently states the case.

E. Safford and F. H. Sleeper, for the appellants.

W. P. Harris, for the appellees.

By Court, ELLETT, J. This is an appeal from the probate court of Franklin County.

The appellants presented their petition to contest the validity of a paper admitted to probate as the last will and testament of D. H. Parker, deceased, and thereupon an issue of *devisavit vel non* was made up, and tried before a jury in the said court. The alleged testamentary paper was a letter from

the deceased to his wife, the female appellee, in the course of which the following language is used, to wit: "But we do not know about these things, and it is well enough to arrange them beforehand; and if I never get back to you, I want all I have to be yours." The deceased was at the time a soldier in the army of the Confederate States, and it was admitted that the paper offered was in his handwriting, and was written at Henderson, Tennessee, on or about the 18th of March, 1862, and mailed to his wife on that day, and afterwards received by her, and that he was over twenty-one years of age, and a resident of Franklin County. It was also admitted that previous to his death he got back to his wife, and died at home in said county, and was with his wife at the time of his death. It was, moreover, proved by witnesses that he reached home about the 6th or 7th of May, 1862, in feeble health, but in sound mind, and that his wife met him at Brookhaven, and accompanied him thence to his home, a distance of about twenty miles, where he died.

The appellees were permitted to prove, after objection, that while absent in the army, both before and after the 18th of March, 1862, the deceased had several times expressed his intention that his wife should have all his property after his death.

It is contended on behalf of the appellants that this will was contingent, depending upon the event of the testator getting back to his wife, and that as he did so get back, the will can have no effect, but is void. This proposition seems to be clearly established by the authorities.

In *Parsons v. Lance*, 1 Ves. Sr. 189, where the will was in the following form: "If I die before my return from my journey to Ireland, that my house and land at Farley Hill be sold," etc., and the testator returned from his journey to Ireland, Lord Chancellor Hardwicke held that it was merely a "provisional contingent disposition, and consequently no part thereof was intended to take effect but in the event of his dying before his return; in which view it was made." There was proof in that case that the testator kept that will by him; it did not appear that he made any other; and he spoke to his friends of a will, showing that he did not intend to die intestate, of which he expressed some detestation. But the lord chancellor said "collateral or parol proof cannot be taken into consideration, which would be dangerous, and what the court, since the statute of frauds, is not warranted to do; for

nothing will set it up by some act done by him after that event to republish the will or defeat the condition."

In *Sinclair v. Hone*, 6 Ves. 607, the testator, residing with his wife in the island of Dominica, and intending to make a voyage to England, took leave of his family, and went to the place whence the packets sailed for England, and while there, in the hourly expectation of embarking, he made a codicil to his will, as follows: "In case I die before I join my beloved wife, Augusta Sinclair, I leave her all my property," etc. The packet accidentally sailed without him, and he returned to his house, where he remained with his family until the ensuing year, when he carried them to England, and subsequently went abroad, and died at Lisbon. It was argued there by very eminent counsel, as it had been here, that this was not a conditional but an absolute disposition, by a man foreseeing the event of his not joining his wife again, and that the construction might be, lest he should never join her. But Sir William Grant, the master of the rolls, said: "That would be infinitely too violent a construction. The words are words of as positive and express condition as can be. The question is only whether a contingency exists or not; and I am of opinion there was condition and contingency." And he held that the condition had happened by the return of the testator under the circumstances, and that the codicil therefore did not take effect.

In the case of *Todd's Will*, 2 Watts & S. 145, the will, made in contemplation of a journey, was as follows: "My wish, desire, and intention now is that if I should not return (which I will, no preventing Providence) what I own shall be divided as follows," etc. The testator returned in bad health, but able to attend to business, and died about a month after. The court held the will to be provisional, and not intended to serve in the event of his death at home, and refused to admit it to probate.

The same course was pursued in the supreme court of Maryland in the case of *Wagner v. McDonald*, 2 Har. & J. 346. The words of the testamentary paper were: "If I should not come to you again, my son will pay," etc. The writer went to Kentucky, and returned, and lived several weeks after; and it was held that the paper could not be admitted to probate as his will: 1 Lomax on Executors, 19; 1 Williams on Executors, 163; *Duppa v. Mayo*, 1 Saund. 278, note 4.

These authorities are sufficient to show that the precise

question involved in this case has undergone repeated and thorough investigation by courts entitled to the highest respect, and ought to be considered decisively settled. The condition is plainly expressed. There being no latent ambiguity, the intention is to be collected from the language employed, and that language is unequivocal. The event having happened upon which the existence and operation of the testamentary disposition depended, the will became inoperative and void, and ought not to have been admitted to probate.

There is no sound principle upon which the testimony in regard to statements made by the deceased while absent in the army, and before his return to his home, as to his intention that his wife should have all his property after his death, could have been admitted to go to the jury. They were not such testamentary words as could be established as a nuncupative will, and no attempt appears to have been made to give to them that effect. The statements were not made with any reference to the paper offered for probate, for the witness states that he knows nothing about that, and does not know when, where, or under what circumstances it was written. And even if made with special reference to it, they would not be competent as evidence to contradict, add to, explain, or in any manner control or affect the construction of the written instrument. Whether that instrument was conditional and eventual or not depended upon its terms, and it could not be competent to establish by parol evidence a different intention from that which the language imports.

Nor can it be seen what possible bearing the condition of the mind of the deceased at the time of his return home, and subsequently, whether sound or unsound, could have had upon the case. If sane, he might have made another will; if insane, he could not. It appears that he was perfectly sane, and competent to transact any business. If any inference could be drawn from this fact in relation to his omission to make another will, the most obvious conclusion would be that he intentionally abstained from doing so. But the evidence was irrelevant, and ought to have been excluded.

Besides these errors in the admission of testimony, the court erred in refusing to charge the jury as requested by the appellants as follows, to wit: "If the jury believe from the evidence that after writing the letter in question, D. H. Parker, the writer, did get back to his wife, they must find a verdict against the will."

The construction and effect of a will, or other writing, are questions of law to be decided by the court, and are not to be left as matters of fact to the determination of the jury. The only questions for the jury were, whether the paper was written by the deceased, and whether the event upon which its existence depended had happened. It was for the court to determine, by proper instructions to the jury, whether the paper was testamentary in its character, and whether it took effect absolutely or only on a condition.

The second, third, and fourth instructions given on behalf of the appellees were in conflict with the views expressed in this opinion, and were therefore erroneous.

The judgment of the court below, establishing the paper in controversy as the last will and testament of Parker, will be reversed, a new trial granted, and the cause remanded.

WILL LIMITED IN ITS OPERATION BY CONDITIONS that defeat it before the death of the testator is void unless republished by the testator: *Vickery v. Hobbs*, 73 Am. Dec. 238.

DECLARATIONS OF TESTATOR, WHEN ADMISSIBLE TO IMPEACH OR INVALIDATE WILL: *Waterman v. Whitney*, 62 Am. Dec. 80, note; see *Lortie v. Keller*, 68 Id. 696; *Vickery v. Hobbs*, 73 Id. 238.

EVIDENCE OF TESTATOR'S INCAPACITY SEVERAL YEARS AFTER MAKING WILL is, by itself, inadmissible to impeach his will: *Terry v. Bugington*, 56 Am. Dec. 423; and see *Waterman v. Whitney*, 62 Id. 71; *Taylor v. Wilburn*, 64 Id. 186; *Rumyan v. Price*, 86 Id. 459.

CONSTRUCTION OF WILL, AS GENERAL RULE, is a question for the court, and not for the jury: *Warner v. Miltenberger*, 83 Am. Dec. 573; *Taylor v. Kelly*, 68 Id. 150.

THE PRINCIPAL CASE IS CITED and approved to the second point stated in the syllabus, in *Gillam v. Brown*, 43 Miss. 653.

STEPHENSON v. OSBORNE.

[41 MISSISSIPPI, 119.]

DEED OF SEPARATION MADE BETWEEN HUSBAND AND WIFE IS ONLY VALID when made through the agency of a trustee acting for the wife, and when so made is binding alone upon the husband and trustee.

MARRIED WOMAN, AS GENERAL RULE, CAN MAKE NO CONTRACT, and exceptions to the rule must be created by positive law. She cannot release or convey her claims on her husband's estate in consideration of a separation, nor bind herself by the covenants of her trustee in a deed of separation.

VALIDITY, CONSTRUCTION, EFFECT, AND DISCHARGE OF CONTRACT ARE GOVERNED by the law in existence at the time it was made. The remedy to enforce the obligation of a contract may be modified without impairing the obligation of the contract.

LEGISLATURE HAS POWER TO CHANGE EXEMPTION LAWS according to its own views of policy and humanity so as to affect the remedy upon existing contracts, but not to the extent to render it nugatory or impracticable.

APPEAL from the probate court of De Soto County. The opinion states the case.

White and Chalmers, for the appellant.

Walter and Scruggs, for the appellee.

By Court, ELLETT, J. The warrant of appraisement of the estate of Isaac Osborne, deceased, issued in February, 1866, commanded the appraisers to set apart to the widow and children such personal property of the decedent as was exempt by law from execution. The appraisers disregarded this direction, and appraised all the personal property as belonging to the estate. The appellee, the widow of the decedent, filed exceptions to the action of the appraisers in this respect, and prayed that the matter be referred back to them with instructions to set apart the exempt property, and the year's provision, as contemplated by law. The appellee filed an answer to the exceptions, alleging that in 1859 the decedent and the appellee had agreed to live separate and apart, and had, together with J. P. Lewis as trustee for the said appellee, executed a deed of separation, dated February 5, 1859, whereby they mutually relinquished forever all claim to the property of each other. That at the time of the separation appellee was possessed of more property than her husband; that the home at which they were then living belonged to her, and that she still owned it; that the parties separated immediately upon the execution of said deed, and afterwards lived together as man and wife; that all the stipulations of the deed were faithfully carried out and executed by all parties during the life of decedent, who died in January, 1866. And on the ground of these facts it is denied that appellee has any claim to the exempt property or other property of decedent.

The deed of separation is made an exhibit with the foregoing answer. It purports to be made between Isaac Osborne of the first part, Jane Osborne of the second part, and John P. Lewis of the third part. It recites the marriage in July, 1857, and the agreement to separate, and then proceeds as follows: "They have therefore agreed and covenanted between and with themselves, and with the said John P. Lewis, trustee for the said Jane Osborne, that they will separate and live

apart from each other. And the said party of the first part thereby covenants with the other parties that he will, and he doth hereby forever, relinquish all claim to the property, real and personal, of the said party of the second part which he now or may hereafter have, in law or equity, as her said husband, and that he will never attempt to exercise any right or control over her as his wife. And the said party of the second part hereby covenants and agrees with the other said parties that she will and doth hereby forever relinquish all claim to the property, real and personal, of the said party of the first part which she may now or hereafter have, in law or equity, as his wife."

There are also clauses providing for the repayment to the husband of money advanced by him to take up the debts of his wife, and for a division of the provisions on hand; but these are immaterial to the present case.

The deed purports to be signed and sealed by all the parties, and is acknowledged by the parties of the first and second part alone. They severally acknowledged that they signed, sealed, and delivered the deed; but on the private examination of the appellee, she acknowledged only that she "signed" the deed, omitting the words "sealed and delivered." In other respects, the acknowledgment is in due form.

The appellee demurred to the answer to her exceptions, and on hearing, the probate court sustained the exceptions, and remanded the appraisement to the appraisers, with instructions to set apart to the widow the exempt property under the law of the 28th of November, 1865, or the value thereof, if the same had been sold; also a year's allowance in provisions, or money to purchase the same.

The appraisers having made their report in pursuance of this order, setting apart to the widow the proceeds of the exempt property which had been sold, and making an allowance in money for the purchase of provisions, the appellant filed exceptions to the report, on the ground that the exempt property was allotted under the act of November, 1865, and that the allowance to the widow consumed the whole personal estate of the deceased, the estate being indebted to various persons for debts contracted before the passage of the said act.

These exceptions were overruled, and the report of the appraisers confirmed and approved.

The appellant assigns for errors: 1. The allowance to ap-

pellee (the widow of the decedent) of the property, exempt from execution, belonging to the estate, she having by deed of separation, in the lifetime of her husband, relinquished all claims upon his estate; 2. The setting apart of the exempt property under the provisions of the act of November, 1865, there being debts due by the estate contracted before the passage of that act, and it being incompetent for the legislature to enlarge the exemptions so as to defeat the collection of debts previously contracted.

1. The first error assigned depends upon the validity and effect of the deed of separation.

This involves a question that has greatly exercised the English courts. Lord Eldon, Lord Kenyon, and other distinguished judges in the courts of law and equity, have not hesitated to declare that if the matter were *res integra*, they would not recognize the validity of any agreement for a separation between a husband and wife, and have denounced them as a violation of fundamental principles of public policy. But they have found the contrary doctrine too firmly established in the courts by the *dicta* of earlier judges, long acquiesced in, to allow of its being overturned, although the foundation upon which it rests has been severely shaken. The ecclesiastical courts, indeed, treat all such agreements as null and void, and will enforce suits for the restitution of conjugal rights in defiance of the conditions of deeds of separation. Courts of equity, even, will not decree the specific performance of an agreement to live apart, but they will enforce the payment of the allowances stipulated in such instruments to be paid by the husband to his wife, and other covenants entered into by him in consideration of a separation. But an agreement of this character made between the husband and wife alone is void, on account of the incapacity of the wife to bind herself by contract, or to take anything by deed or contract directly from her husband. Agreements of separation between husband and wife are only valid when made through the agency of a trustee acting for the wife. The husband will in such cases be bound by his covenants or conveyances to the trustee for the benefit of his wife, and the trustee will be bound by any covenants entered into by him on the part of the wife to indemnify the husband against liability for her support, or for her debts, and against her claims on his property. A married woman, as a general rule, can make no contract. She cannot be estopped by her covenant, nor bound by her deed of conveyance. The excep

tions to this rule must be created by positive law. Thus by our statutes a married woman may purchase property with her own money, and may make certain contracts binding on her separate estate for her support, or the support, management, and improvement of such separate property: Rev. Code, 336, arts. 24, 25. She may convey her separate estate, real or personal, by deed jointly with her husband, and by implication she may encumber it in like manner, to the extent of her income, for her husband's debts; and in the case of a conveyance of real estate, at least she will be bound by her covenants of warranty: *Id.*, 307, art. 4; 335, art. 23. She may relinquish her right of dower in her husband's land, by deed executed jointly with him, or by herself alone, where the land has been previously conveyed by her husband: *Id.*, 313, art. 32. But such a release of dower can only be made in aid of a conveyance by her husband to a third person. With such exceptions as are stated, a married woman cannot bind herself by any contract, nor can she be bound by the covenants of her trustee in a deed of separation; nor can she, in consideration of such separation, convey or release to her husband her claims on his estate. In support of these principles, we need only refer to the authorities, without pretending to quote from them: *Carter v. Carter*, 14 Smedes & M. 59; *Mills v. Richards*, 34 Miss. 77; *Lord St. John v. Lady St. John*, 11 Ves. 526; *Marshall v. Rutton*, 8 Term Rep. 545; *Carson v. Murray*, 3 Paige, 483; *Rogers v. Rogers*, 4 Id. 516 [27 Am. Dec. 84]; 2 Story's Eq. Jur., secs. 1427, 1428; 2 Kent's Com. 176; Shelford on Marriage and Divorce, c. 6, secs. 1, 2; Roper on Husband and Wife, c. 22, p. 269, and notes; Clancy on Husband and Wife, c. 4, p. 397.

The case of *More v. Freeman*, Bun. 205, and *Brighton v. Chapman*, 2 Anstr. 345, are relied on as authority for the position that the wife is personally bound by a deed of separation. But they do not sustain such a general proposition. In both those cases bills were filed against the trustees under the articles of separation, by the husband, to enforce the payment of an allowance covenanted by the trustees to be paid to him out of property of the wife, which, in pursuance of the terms of the separation, had been transferred by the wife to the trustees for that purpose. By the rules of the English chancery, a married woman, as to her separate property, is regarded as a *feme sole*, and has the absolute power of disposition over it. The transfer of any portion of her property to trustees for the benefit of her husband upon an agreement of separation seems

to have been considered in those cases free from objection, and no question was raised as to her power to make it. The defense by the trustees was rested in the case of *More v. Freeman*, *supra*, on the ground that the settlement was made by duress, and in the other case on the ground that the complainant had molested his wife contrary to his covenant, and had thereby forfeited his annuity. The case of *Hutton v. Hutton*, 3 Pa. St. 100, is not harmony with the general current of the authorities, and is at variance with the former rulings of this court in the cases already cited.

In the case now under discussion, the personal covenant of the wife, made with her husband and the trustee, that she will and doth thereby forever relinquish all claim to the property of the husband, is relied on as opposing a bar to the assertion of the claim. If operative at all, it must be either as a covenant with her husband, having the effect of a legal estoppel, or as a release to her husband of her dower and distributive share of his estate; and in either aspect it cannot have the effect contended for, and cannot operate either as an estoppel or as a release.

We are therefore of opinion that the deed of separation did not preclude the appellee from asserting her claim to the estate of her deceased husband.

2. The error assigned is, that the allotment of the exempt property was made under the act of November 28, 1865, whereas there were debts due by the decedent contracted before the passage of that act.

The act alluded to (Pamph., p. 187) declares "that the several exemption laws of this state be and are hereby so amended that hereafter the following described property, real and personal, shall be exempt from seizure and from sale under execution or attachment"; and then follows a statement of the property so exempt. The third section of the act provides "that all property, real and personal, exempted by the provisions of this act, upon the death of the husband shall descend to the widow, as the head of the family, during her widowhood, for the use and benefit of herself and children," etc. The eighth section provides that the act shall take effect and be in force from and after its passage.

The husband died in January, 1866, after this act took effect, and the statute applied to the case, unless there is something in the objection made in regard to its influence upon the rights of the creditors of the estate whose debts accrued before the

passage of the act. And in this view it is insisted that the act cannot consistently with fundamental constitutional principles receive a construction that would impair the rights of the creditors as they existed at the date of their contracts.

Laws exempting certain descriptions of property from liability to be taken in execution for debt are founded in a wise and beneficent public policy. The state has an interest that no portion of its citizens shall be reduced to a condition of destitution so as to be prevented from prosecuting useful industrial employments for which they are fitted; and that families shall not be deprived by extravagance or misfortune of the shelter and comforts necessary to health and activity.

Nor is such legislation usually regarded, even when retrospective in its character, as obnoxious to constitutional objections. There is a clear distinction drawn between rights and remedies, between the legal obligation of a contract and the proceeding appointed by law for its enforcement. Whatever belongs to the obligation of the contract, that is, to its validity, construction, effect, and discharge, is governed by the law in existence at the time it was made, which enters into and forms a part of it, and follows it whenever it may be sought to be enforced. But the remedy is for the most part the act of law-making power, providing a mode of redress for the wrong occasioned by the breach of the contract. It does not necessarily constitute a part of the obligation of the contract; and except in cases of peculiar character, it is subject to the right of modification or repeal, which is the prerogative of the legislature: *Coffman v. Bank of Kentucky*, 41 Miss. 212 [post, p. 371].

We have not met with an authority in which the constitutionality of exemption laws has been directly raised or decided, but they are put by judges of great distinction as instances of laws operating on the remedy only, which the legislature may pass. Thus Chief Justice Taney, in *Bronson v. Kinzie*, 1 How. 315, says: "Undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts, as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to executions on judgments. Regulations of this description have

always been considered in every civilized community as properly belonging to the remedy, to be exercised or not by every sovereignty according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community."

It would be difficult to add anything to the force of this reasoning. It was not, it is true, a point involved and decided in the cause, but it was assumed as an illustration of the case under discussion. The principle upon which the remarks of the chief justice were founded has, however, been established beyond controversy both in the supreme court of the United States and in this court. Where imprisonment of the body of the debtor was allowed as a part of the remedy for the enforcement of contracts, it is settled that legislation which discharges the person of the debtor from actual custody in execution, and which releases his bail, who have become bound for his surrender of himself into custody, is valid and effectual, and is not in violation of any constitutional principle. In the case of *Sturges v. Crowninshield*, 4 Wheat. 200, Chief Justice Marshall says: "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation."

Afterwards this question came up directly for decision, and the court in their opinion say: "Can it be doubted but the legislatures of the states, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such law might extend to present as well as to future imprisonment? We are not aware that such power in the states has ever been questioned. . . . This is a measure which must be regulated by the views of policy and expediency entertained by the state legislatures. Such laws act merely upon the remedy, and that in part only. They do not take away the

entire remedy, but only so far as imprisonment forms a part of such remedy": *Mason v. Haile*, 12 Wheat. 370. The same question was before this court in the case of *Brown v. Dillahunty*, 4 Smedes & M. 713, in which, in reply to the position that the rights of the plaintiffs became vested under the law as it stood at the time of the execution of the bail bond, and could not therefore be impaired by a subsequent law, it was held that the mere imprisonment of a debtor as a means of enforcing payment belongs to the remedy, and does not reach the contract, nor impair its obligation.

In reference to other cases belonging to the same general class, the supreme court of the United States have said: "It is within the undoubted power of the state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts. Such, too, is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned": *Jackson v. Lamphire*, 3 Pet. 290. The doctrine here stated has been approved by express adjudication in this state, and recording acts, applicable to judgments already obtained, have been held not to impair the obligation of the contract by operating upon the remedy, although new conditions were imposed upon the party, without the observance of which he would lose his right already acquired: *Tarpley v. Hamer*, 9 Smedes & M. 310.

If the legislature may take away the right to imprison the person of the debtor which existed at the date of the contract, and at the time judgment was obtained upon it in a court of law, and may discharge him from custody, and release his bail after his body has been actually taken in execution, it would seem to be difficult to frame an argument against the right of the legislature to exempt a portion of the property of the debtor from liability to execution for his debts, and to make such exemption apply to pre-existing contracts.

The legislature exercises this power according to its own views of humanity and sound policy. But it is not without its proper limit, and it may be abused. Every party is entitled to an adequate and available remedy for the enforcement

of his contracts, and any legislation which impairs the value and benefit of the contract, though professing to act upon the remedy, would impair its obligation. It is not competent for the legislature, under color of an exemption law, so to obstruct the remedy upon contracts as to render it nugatory or impracticable. An abuse of the legislative discretion in this respect would demand the interposition of the court. We do not undertake to intimate what would amount to such abuse; such a question would be one of great delicacy and difficulty. We only mean to say that the power of the legislature over this subject is not unrestricted by the constitution, and that cases may arise in which it might be the duty of the judiciary to arrest its exercise: *Nevitt v. Bank of Port Gibson*, 6 Smedes & M. 523; *Briscoe v. Anketell*, 28 Miss. 371 [61 Am. Dec. 553]; *Coffman v. Bank of Kentucky*, 41 Id. 212 [post, p. 371].

We think the court below did not err in directing the exempt property in the case to be allotted to the widow under the act of November, 1865.

Let the decree be affirmed.

VALIDITY OF AGREEMENTS FOR OR RESPECTING SEPARATION: See *Mercala v. People*, 35 Am. Dec. 653, and note 668; *People v. Mercala*, 38 Id. 644; *McKean v. Phillips*, 37 Id. 438; *Sayles v. Sayles*, 53 Id. 208, and note 212.

CONTRACTS OF MARRIED WOMAN ARE VOID AT COMMON LAW: *Dobbin v. Hubbard*, 65 Am. Dec. 425; and see *MacLay v. Love*, 85 Id. 133, and note 144; *Weisbrod v. Chicago etc. R. R. Co.*, 86 Id. 743; *Yale v. Dederer*, 78 Id. 226, note.

LEX LOCI CONTRACTUS AT TIME CONTRACT WAS MADE DETERMINES WHAT CONTRACT WAS, and the *lex fori* at the time the enforcement is sought prescribes the remedy: *Hefertin v. Sinsinderfer*, 85 Am. Dec. 593.

THE PRINCIPAL CASE IS CITED and approved, as it respects the validity of agreements for separation between husband and wife, in *Garland v. Garland*, 50 Miss. 716; *House v. Harden*, 52 Id. 874; and is cited to the point that a constitutional convention has no more power than a legislature, and is limited to preliminary, temporary, and provisional legislation, in *Lawson v. Jeffries*, 47 Id. 707. It is cited in *Johnson v. Fletcher*, 54 Id. 630, as being overruled in *Lesley v. Phipps*, 49 Id. 790, so far as it holds that the legislature has power to materially increase the amount of property withdrawn from liability to the owner's debts. And see *Bailey v. Fitz Gerald*, 56 Id. 568, where the considerations which prevailed with the court to overrule the judgment in this respect are stated.

DEEDS AND AGREEMENTS BETWEEN HUSBAND AND WIFE FOR SEPARATION. — It has frequently been urged against deeds of separation between husband and wife that it is against public policy to allow parties sustaining that relation to vary their duties and responsibilities by entering into an agreement which contemplates a partial dissolution of the marriage contract: See *Goodwin v. Goodwin*, 4 Day, 343, 351; *Callins v. Long*, 22 Barb. 103;

Douchouquette v. Douchouquette, 1 Mo. 669; *St. John v. St. John*, 11 Ves. 530. And it was declared by the court in North Carolina that articles of separation between husband and wife, whether entered into before or after the separation, are against law and public policy, and therefore void: *Collins v. Collins*, 1 Phill. Eq. 153. This doctrine is, however, questioned in the recent case of *Sparks v. Sparks*, 94 N. C. 527. It has been repeatedly held that a mere contract between husband and wife for future separation is against public policy and void: *Gain v. Poor*, 3 Met. (Ky.) 507; *Simpson v. Simpson*, 4 Dana, 140; *Westmeath v. Westmeath*, 1 Dow & C. 519; *Procter v. Robinson*, 35 Beav. 329; *Anonymous*, 3 Kay & J. 382. But it has long been settled in England that a deed of separation between husband and wife, entered into through the medium of a trustee, will be upheld and enforced, if followed by immediate separation, or if separation has previously taken place: See *Compton v. Collinson*, 2 Brown Ch. 377; *Jee v. Thurlow*, 2 Barn. & C. 546; *Wilson v. Wilson*, 1 H. L. Cas. 538; *In re Besant*, L. R. 11 Ch. Div. 508; S. C., L. R. 12 Ch. Div. 605, 625; *Gibbs v. Harding*, L. R. 5 Ch. 336; *Hamilton v. Rector*, L. R. 13 Eq. 511. And a legal and proper covenant in a separation deed will be enforced in a court of equity, although other covenants in the deed may be illegal: *Hamilton v. Rector*, L. R. 13 Eq. 511; *Merryweather v. Jones*, 4 Giff. 499. In this country, the courts have not gone to the same length as the English courts in sanctioning deeds of separation between husband and wife. But questions respecting their validity have arisen in many of the states; and it has frequently been decided that it is competent and admissible for husband and wife, through the intervention of a trustee, to enter into articles of separation, by which the husband makes provision for the support of the wife, by allowance or otherwise, and the agreement is to be deemed valid both at law and in equity: See *Nichols v. Palmer*, 5 Day, 47; *Wells v. Stout*, 9 Cal. 479; *Sterling v. Sterling*, 12 Ga. 201; *Phillips v. Meyers*, 82 Ill. 67; *McKee v. Reynolds*, 26 Iowa, 578; *Loud v. Loud*, 4 Bush, 453; *Kremelberg v. Kremelberg*, 52 Md. 553; *Fox v. Davis*, 113 Mass. 255; *Dutton v. Dutton*, 30 Ind. 452; *Dupre v. Rein*, 56 How. Pr. 228; S. C., 7 Abb. N. C. 256; *Mann v. Hulbert*, 38 Hun, 27, 30; *Garver v. Miller*, 16 Ohio St. 527; *Hitner v. Hitner*, 54 Pa. St. 110; *Bowers v. Clark*, 1 Phila. 561; *Keys v. Keys*, 11 Heisk. 425; *Roberts v. Frisby*, 38 Tex. 219; *Squires v. Squires*, 53 Vt. 208; S. C., 38 Am. Rep. 668.

In California, it is expressly provided that a husband and wife may agree in writing to an immediate separation, and may make provision for the support of either of them and of their children during such separation. And the mutual consent of the parties is a sufficient consideration for such an agreement: Cal. Civ. Code, sec. 159, 160. An agreement of separation is of no effect unless the parties are separated when the agreement is entered into, or they separate afterward in pursuance of the agreement: *Allen v. Afflick*, 64 How. Pr. 380; S. C., 10 Daly, 509; *Wells v. Stout*, 9 Cal. 479; *Fox v. Davis*, 113 Mass. 255. But when a separation has actually taken place, or when it has been fully decided upon, and the articles contemplate a suitable provision for the wife and children, or an equitable and suitable division of the property, the benefits of which both have enjoyed during the coverture, no principle of public policy is disturbed by such agreements. On the contrary, if they are fair and equal, and are not the result of fraud or coercion, abundant reasons may be found for supporting them in their tendency to put an end to controversies, to prevent litigation, and to give to the wife an independence in respect to her support which without some such arrangement she could not have under the circumstances: *Cooley, C. J., in Randall v.*

Randall, 37 Mich. 563, 571; and see *Swiss v. Sotter*, 26 Gratt. 574, 582; *Harshberger v. Alger*, 31 Id. 52, 60. So the validity of deeds of separation has been affirmed in the supreme court of the United States; and it is held that a covenant by a husband for the maintenance of the wife contained in a deed of separation between them, through the medium of trustees, where the consideration is apparent, is valid, and will be enforced in equity if it appears that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one that had already taken place: *Walker v. Walker*, 9 Wall. 743, 751. A court of equity will, at the instance of the trustee for the benefit of the wife, enforce provisions made by the husband for her benefit, and will give him a right of action against the trustee for any breach of the contract by the wife: *Calkins v. Levy*, 22 Barb. 97; *Buen v. Vaughan*, 5 Abb. Pr., N. S., 269; S. C., 3 Keyes, 345. But it should be observed that both courts of law and equity will refuse to recognize the validity of voluntary deeds of separation so far as they undertake to release the parties from the duties and obligations resulting from the marriage contract: *Hardy v. Smith*, 136 Mass. 328; *Beard v. Beard*, 65 Cal. 364; *Kremelberg v. Kremelberg*, 52 Md. 553, 563; *Speck v. Dauman*, 7 Mo. App. 165; *Moon v. Baum*, 58 Ind. 194. Nor will an agreement for separation be sustained if it be the result of fraud or duress: *Miller v. Miller*, 16 Ohio St. 527; *Robertson v. Robertson*, 25 Iowa, 350, 354. But an agreement by a husband for his wife's support, made pending divorce proceedings, if absolute, and fettered with no condition to arise out of the divorce, is not necessarily void: *Schmieding v. Doellner*, 10 Mo. App. 373; compare *Phillips v. Thorpe*, 10 Or. 496; *Cross v. Cross*, 58 N. H. 373; *Stilson v. Stilson*, 46 Conn. 15; *Kilborn v. Field*, 78 Pa. St. 194.

It has generally been held, as in the principal case, that an agreement of separation made between husband and wife alone, without the intervention of a trustee, is utterly void: See *Cropey v. McKinney*, 30 Barb. 47; *Morgan v. Potter*, 17 Han. 403; *Simpson v. Simpson*, 4 Dana, 140; *Buchner v. Ruel*, 13 Rich. 157, 160; *Phillips v. Meyers*, 82 Ill. 67. But such agreements have been sustained without the intervention of trustees: *Randall v. Randall*, 37 Mich. 563; and see *Deabrough v. Deabrough*, 29 Han. 592; *Carpenter v. Osburn*, 102 N. Y. 552; *Dillinger v. Dillinger*, 35 Pa. St. 357; *Hutchins v. Dixon*, 11 Md. 29, 40; *Jones v. Clifton*, 101 U. S. 225, 229.

After the separation of husband and wife in pursuance of an agreement between them, if the wife subsequently returns for the purpose of resuming her duties and privileges as a married woman, and is received by the husband as his wife, the previous agreement to live separate is at an end, and the bond given for the separate maintenance falls with the agreement: *Shelthar v. Gregory*, 2 Wend. 422; *Hitner's Appeal*, 54 Pa. St. 110; *Garland v. Garland*, 50 Miss. 694; *Wells v. Stout*, 9 Cal. 479, 498; *Bindley v. Mulloney*, L. R. 7 Eq. 343; and the subsequent abandonment of the husband by the wife does not revive the bond, or the legal liability of the husband to afford her a separate maintenance: *Shelthar v. Gregory*, 2 Wend. 422. Reconciliation immediately after the execution of the deed of separation takes away all the consideration for the settlements therein: *Kahr v. Smith*, 20 Wall. 31. And if the husband and wife are once more living under the same roof, the court will hold as matter of law that there is a reconciliation, and will not consider the question whether they actually cohabit or occupy the same room: N. Y. Sup. Ct.; 19 N. Y. Week. Dig. 245. If the separation be intended during life, it is held that the offer of the husband to cohabit with his wife does not end the contract for separate maintenance: *Calkins v. Long*, 22 Barb.

97; the wife has a right to abide by the terms of the agreement, and to refuse to return to her husband: *Wallace v. Bassett*, 41 Id. 92; *Mann v. Hubbert*, 38 Hun, 27. And the right of the wife to recover the separate support provided for is not impaired by an absolute divorce granted the wife for the misconduct of the husband, especially where such decree of divorce contains no provision for the wife's support: *Carpenter v. Osburn*, 102 N. Y. 552; and see *Blake v. Cooper*, 7 Serg. & R. 500; *Clark v. Foedick*, 1 N. Y. State Rep. 90; *Morrall v. Morrall*, L. R. 6 Pro. & D. 98. Compare *Alles v. Wyman*, 10 Gray, 222.

A voluntary separation has been held no defense to a claim for alimony on divorce: *Wilson v. Wilson*, 40 Iowa, 280. But in an action by the wife for divorce on the ground of cruelty, an agreement for separation made two years previously, after the acts of cruelty, and after actual separation, and substantially complied with by the husband, was held to be a valid defense: *Squires v. Squires*, 53 Vt. 208; S. C., 38 Am. Rep. 668. The doctrine of this case is, however, repudiated by the supreme court of Rhode Island in *Foedick v. Foedick*, 20 Reporter, 382, holding that articles of separation agreed and acted upon are not *per se* a bar to a suit for a divorce on grounds existing at the time of the separation. And see *Rogers v. Rogers*, 4 Paige, 516. It is no defense to an action on the agreement for separation that the wife has ceased to be chaste: *Bradley v. Bradley*, L. R. 7 Pro. & D. 237. And a conveyance by the husband to a trustee for the use of his wife on the execution of articles of separation will not be set aside on account of the subsequent adultery of the wife while living apart from her husband: *Dixon v. Dixon*, 23 N. J. Eq. 316; S. C., 24 Id. 133; and see *Lister v. Lister*, 35 Id. 49, 57; *Charlesworth v. Holk*, L. R. 9 Ex. 38, 40. So a voluntary covenant by the husband in a deed of separation for the support of the wife, made with full knowledge of the latter's adultery, is not avoided by a decree of absolute divorce obtained at the instance of the husband, and may still be enforced: *Krenelberg v. Krenelberg*, 52 Md. 553. And a voluntary deed of separation is no bar to a *bona fide* application for a divorce on the ground of impotency: *J. G. v. H. G.*, 33 Id. 401.

Provisions in an agreement for separation, by which the father renounces to the mother his right to the children, are not necessarily void as against public policy: *Mercein v. People*, 25 Wend. 64; S. C., 35 Am. Dec. 653; *Allen v. Affick*, 64 How. Pr. 380; S. C., 10 Daly, 509; and the agreement may be valid as to the wife, although provisions as to the children be void: *Id.* As to the custody of children under modern English separation deeds, see *In re Besant*, L. R. 11 Ch. Div. 508; S. C., L. R. 12 Id. 605; *Hunt v. Hunt*, 53 L. T. R., N. S., 302; S. C., 20 Reporter, 95.

Where articles of separation between husband and wife provide for a specific sum as alimony to the wife during her life, it does not cease on the death of the husband: *Carson v. Murray*, 3 Paige, 483; *Stratton v. Stratton*, 77 Me. 373. Nor does a deed of separation, as a rule, affect the property rights of the survivor: See *Read v. Howe*, 13 Iowa, 50; *Cooney v. Woodburn*, 33 Md. 320; *Sparks v. Sparks*, 94 N. C. 527; *Castlebury v. Maynard*, 95 Id. 281; *Watkins v. Watkins*, 7 Yerg. 283; *McAlister v. Novenger*, 54 Mo. 251. And it does not release the surviving husband from the obligation to bury his wife: *Sears v. Gidley*, 41 Mich. 590; *Smyley v. Reese*, 53 Ala. 89; *Cunningham v. Reardon*, 98 Mass. 538; *Bradehaw v. Beard*, 12 Conn. B., N. S., 344.

COFFMAN v. BANK OF KENTUCKY.

[41 MISSISSIPPI, 212.]

ESSENTS OF HOLDER OF BILL OF EXCHANGE DRAWN IN ONE STATE, and payable in another, are governed by the laws of the latter.

FAILURE TO PRODUCE BILL OF EXCHANGE AT TIME OF PAYMENT BY DRAWER to original holder is sufficient to put the drawer on inquiry, and to lead him to notice of the transfer of the bill, and such payment, though made after maturity, is no defense against the holder.

OBJECT OF NOTICE OF PROTEST OF BILL OF EXCHANGE IS TO GIVE NOTICE to the parties to the bill of its dishonor, and is sufficient if signed by the notary.

NOTICE OF PROTEST OF BILL OF EXCHANGE indorsed by a bank may be addressed to its cashier.

ACTION on a bill of exchange. The opinion states the case.

J. Z. George, for the plaintiffs in error.

John W. C. Watson, for the defendant in error.

By Court, **HANDY, C. J.** This action was brought on a bill of exchange drawn at Graysport, in this state, by F. E. Willis, payable to and indorsed by Hilary Talbert, on McRea, Coffman, & Co. of New Orleans, Louisiana, and indorsed by J. H. Van Culin, cashier, and J. H. Palfrey, cashier. It was brought against the drawer and Talbert and Coffman, and judgment was rendered against them; but the writ of error is sued out in the name of the defendant Willis alone.

The case is brought up on a bill of exceptions taken to the action of the court below in overruling the defendants' motion for a new trial. The grounds of that motion are: 1. That the court excluded certain evidence offered on the part of the defendants; and 2. That the verdict was not sustained by the evidence.

The first error here assigned is the exclusion of the evidence referred to in the motion in the court below.

This evidence was, in substance, that the bill sued on was given to McRea, Coffman, & Co. to settle a balance claimed to be due them from the drawer, Willis, which was composed of two and one half per cent for advancing moneys for the drawer, and two and one half per cent for accepting, and eight per cent for loan of moneys and for acceptances of bills of exchange for and on account of the drawer; and further, that after the maturity of the bill it was paid to McRea, Coffman, & Co. by an agent of the drawer, which agent was ignorant that the bill had been negotiated and assigned.

The bill, though drawn in this state, was payable in Louisiana, and was indorsed before maturity to the bank of Kentucky. The rights of the holder are therefore not governed by the law of this state, which would have allowed the defense set up on a negotiable instrument payable in this state; but are governed by the general principles of the commercial law which prevail in the state of Louisiana. And the defense of failure of illegality of consideration, arising in virtue of provisions of our laws, is not available in an action on such a bill brought by a *bona fide* indorser of it without notice: *Fellows v. Harris*, 12 Smedes & M. 462; *Emanuel v. White*, 34 Miss. 56 [69 Am. Dec. 385]. The evidence offered as to the usury of the transaction was therefore properly rejected.

As to the alleged payment by the drawer to the acceptors after maturity, it appears by the evidence in the record that it was made after the bill had been negotiated to the Bank of Kentucky, and the proposed evidence shows that it was after its maturity. If paid, it was without the production of the bill, which itself was sufficient to put the drawer on inquiry, and to lead him to notice of the transfer of it; and if he paid it without the production of the bill, it was gross negligence, and must be considered as done in his own wrong. Certainly such a payment cannot affect the rights of the holder, for it was the duty of the drawer to require the production of the bill before paying the money due on it.

The second error assigned is, that the evidence is not sufficient to support the verdict; and under this assignment it is insisted, in the first place, that there was no evidence that the notice of dishonor of the bill was sent to the proper post-office of the drawer.

The position is founded in mistake in point of fact. The record shows that the notice to the drawer was sent to Graysport, in this state; and the bill of exceptions shows that it was admitted by the defendants on the trial that that was the proper post-office of the drawer in 1855, when the bill was protested.

2. It is objected that the notice was sent to Hopkinsville, Kentucky, addressed to Van Culin, cashier, when it should have been given to him at New Orleans, where he resided at that time.

The record shows that the bill was the property of the Bank of Kentucky, and that it was indorsed for collection by Van Culin as cashier of that bank, and that at the time of its

maturity he had ceased to be an officer of the bank, but resided in New Orleans; that the notice was addressed and sent on the next day after the protest to Van Culin, cashier, at Hopkinsville, and were taken from the post-office there by the officer of the Bank of Kentucky on the day they reached there by mail, and were transmitted by mail on the next day to the drawer and first indorser. It appears that the notices were addressed to Van Culin at Hopkinsville by the notary at New Orleans by the instruction of the cashier of the Bank of Louisiana, who was the holder of the bill for collection, and who was the last indorser on it.

The notice, then, was in fact given to the last indorser in New Orleans, who caused notices to be sent to his prior indorser at the place from which he received it for collection, and the notices were actually received there by the bank, and were duly transmitted to the drawer and first indorser. It is immaterial by what hand the notices were placed in the post-office at Hopkinsville. It is sufficient that they were signed by the notary, an officer whose duty it was to make the protest, and who was empowered to give notice for the holder: Story on Bills, sec. 388. If the notice had been given to Van Culin in New Orleans, he could in all probability have done nothing more than to communicate it to the Bank of Kentucky; and that was done by the notary. It was, then, useless to give him notice; for he had been acting in the matter only as agent, and his agency had ceased. The notice sent to the bank was therefore proper for her own protection, and to enable her to transmit the notices received by her so as to fix the liability of the drawer and first indorser.

It is said that if the bank was the real holder, the notice should have been given to her, and not addressed to Van Culin as cashier. Substantially it was addressed to the bank by being addressed to her cashier; and it was received by the bank as if it had been formally addressed to her, and that is all that was necessary; for the object of the notice to her was that she might protect herself by transmitting notices to the prior parties.

Again: it is said that the bank should have given notice in her own name to the prior parties to the bill. The object of the notice, so far as those parties were interested, was to apprise them that the bill had not been paid, and the notices signed by the notary, an officer authorized by law to perform that duty, were certainly sufficient for that purpose. And if

the bank, after receiving notice of the dishonor of the bill, was authorized to give notice to the prior parties, and that would have been sufficient to charge them, it was clearly sufficient if, in due time, she transmitted to them the notices received by her from the notary, signed by him and addressed to them; for there could be no more certain or solemn mode of informing them of the fact that the bill had not been paid than the certificate of the officer whose duty it was to protest it.

Let the judgment be affirmed.

CONTRACT OF ACCEPTOR OF BILL OF EXCHANGE IS GOVERNED BY LAW of the place of payment: *Hunt v. Standard*, 77 Am. Dec. 79, and see note 57; *Emanuel v. White*, 69 Id. 385; *Stanford v. Prust*, 73 Id. 734; and negotiable instruments generally are governed by the law of the place where they are expressly made payable: *City of Aurora v. West*, 85 Id. 413; *Lewis v. Headley*, 87 Id. 227.

NOTICE OF DISHONOR of promissory note, what sufficient: *Selden v. Westington*, 79 Am. Dec. 650, and note 661.

STRANGER TO BILL OF EXCHANGE CANNOT GIVE NOTICE OF DISHONOR: *Brattleford v. Williams*, 74 Am. Dec. 559.

THE PRINCIPAL CASE IS CITED to the point that the remedy does not necessarily constitute a part of the obligation of a contract, and is subject to the right of modification or repeal, which is the prerogative of the legislature, in *Stephenson v. Osborne*, 41 Miss. 128, 131; *Disimukes v. Stokes*, 41 Id. 434.

CASES
IN THE
SUPREME COURT
OF
MISSOURI

SMITH v. IRWIN.

[87 MISSOURI, 100.]

JOINT MAKERS OF PROMISSORY NOTE BARRED BY STATUTE OF LIMITATIONS WILL NOT BE DEPRIVED OF THEIR DEFENSE of the bar of the statute by an allowance in a probate court of a demand against the estate of a deceased joint maker, and payments made thereon by the administrator of such deceased maker.

ACTION upon a promissory note. The opinion states the case.

Douglas and Gage, for the plaintiffs in error.

E. B. Ewing, for the defendants in error.

By Court, HOLMES, J. This was a suit upon a promissory note against two of three joint makers, the third being dead. One of the defendants was not served with process, and the other pleaded the statute of limitations as a defense. To avoid this the plaintiff relied upon a payment made within ten years before suit. The evidence showed that after the decease of the third maker the note had been presented for allowance in the probate court against his estate, and the allowance was indorsed on the note as follows: "Allowed vs. the estate of S. B., 18th July, 1859, \$554.64, balance of one third of the note." The note was drawn payable in six months after date, and was dated the 20th of September, 1847. Payments had been made by the deceased in his lifetime, in the year 1849, but there had been no payment by either of the other makers within ten years, and at the time of the allowance the note

stood barred as against all three, unless taken out by the operation of the statute by the payments made in 1849 and before; and when this suit was begun the statute had run as against the defendants, unless the allowance had prevented the bar.

The determination of the latter point will dispose of the case. There is no express acknowledgment by the administrator of the existence of the debt, nor any new promise to pay it. He merely omits to avail himself of the statute as a defense against the allowance; the court decides that the debt is a subsisting demand against the estate, and makes the allowance, which is a judgment. He makes no voluntary payment of the note in his character of personal representative of the deceased maker. The note was joint and several under the statute. By the death of one party all community of interest between him and the other joint makers from which any agency could be implied had ceased to exist. The administrator was not the representative or the agent of the other makers for any purpose. He had no power as such to create a new debt, even against the estate, much less against the other parties. His duty was to collect the debts of the estate, and pay such demands as should be allowed against the estate when so ordered. Between him and the defendants here there was no kind of privity.

Without undertaking to review all the authorities, which are numerous and somewhat conflicting, upon the effect of partial payments in reference to the statute of limitations, it will be sufficient to declare our opinion to be that this allowance did not revive nor continue the debt as against the other makers, nor prevent the statute running against them: *Slater v. Lawson*, 1 Barn. & Adol. 396; *Hathaway v. Haskell*, 9 Pick. 42; *Smith v. Townsend*, 9 Rich. 44; Angell on Limitations, sec. 252; *Shoemaker v. Benedict*, 11 N. Y. 176 [62 Am. Dec. 95].

In *Craig v. Callaway*, 12 Mo. 94, both joint makers were still living, and a payment of interest had been made by the surety on account of the principal debtor before the statute bar had been attached; and it is therefore widely distinguishable from this case. It has been held that a part payment by an administrator will be binding on the party making it, there being an implication to that effect from the peculiar provisions of the statute; and that a part payment by one of several joint contractors will bind all the rest, when the parties are living, resting on the principle that a payment by one is a payment for

all, the one acting virtually as agent for the rest: *Foster v. Starkey*, 12 Cush. 325; *Whitcomb v. Whitney*, 2 Doug. 654; *Wyatt v. Hudson*, 8 Bing. 309; *Craig v. Callaway*, 12 Mo. 94. The words of the statute are, that "nothing contained in the two preceding sections shall alter, take away, or lessen the effect of a payment of any principal or interest made by any person": Rev. Code 1855, p. 1053, secs. 12-14. This leaves the effect of the payment to be determined by the general law as it stood before the passage of the act, and it may reasonably be understood to mean any person who is competent in law to make such payment, and thereby bind the other joint contractors, and one who does make such payment as his own voluntary act.

We are not inclined to extend the application of this doctrine any further than these cases have gone, nor is it necessary here to give our sanction to them. In *Shoemaker v. Benedict*, 11 N. Y. 176 [62 Am. Dec. 95], this subject is elaborately considered, and the doctrine of the cases which have followed the decision in *Whitcomb v. Whiting*, *supra*, expressly overruled, Denio, J., dissenting, but agreeing with the rest of the court that such payments made by one of the joint contractors after the statute bar had run was not binding on the other parties. We have no hesitation in concurring with that opinion thus far. Any joint privity or implied agency must then be considered as terminated: *Bell v. Morrison*, 1 Pet. 373; *Atkins v. Tredgold*, 2 Barn. & C. 23; *Van Keuren v. Parmalee*, 2 N. Y. 523 [51 Am. Dec. 322]. Whether this note was barred or not at the time when this allowance was made, there was no voluntary payment made by the administrator, as the representative of the deceased party, that would have the effect, on any principle of implied agency, privity of contract, or otherwise, to create a new contract, or to continue the former liability beyond the time of the statute bar. A debt might very well be allowed by a probate court, the administrator merely waiving or omitting to plead the statute of limitations. The court would only have to consider whether or not the debt was a subsisting demand against the estate; and when once allowed, the demand becomes a judgment, which the administrator is bound to pay when so ordered by the court. To hold that this could take the case out of the operation of the statute as against the other parties, in reference to whom the debt had stood barred for many years, would be

going far beyond any authority that has been adduced, and beyond any sound and just principles of law.

The judgment is reversed, and the cause remanded.

The other judges concurred.

PROMISE OR ACKNOWLEDGMENT OF ONE OF SEVERAL MAKERS OF PROMISSORY NOTE does not charge the co-makers: *Briccos v. Anstett*, 61 Am. Dec. 553, and see note 557.

PART PAYMENT UPON JOINT AND SEVERAL NOTE MADE BY ONE MAKER does not affect the others' right to plead the statute of limitations: *Shoemaker v. Benedict*, 62 Am. Dec. 95, and see note 101.

PRESENTATION OF CLAIM AGAINST ESTATE STOPS RUNNING OF STATUTE OF LIMITATIONS IN CALIFORNIA: *Beckett v. Selover*, 68 Am. Dec. 237, and note 256; compare *Carriger v. Whittington*, 72 Id. 212.

THE PRINCIPAL CASE IS DISTINGUISHED IN *County of Vernon etc. v. Stewart*, 64 Mo. 411, holding that part payment upon a bond by the administrator of one of the joint makers within the statutory period will prevent the running of the statute of limitations in favor of the remainder.

NEWMAN v. HOOK.

[87 MISSOURI, 207.]

IN ORDER THAT SHERIFF MAY PASS TITLE TO PERSONAL PROPERTY by a levy and sale under execution, he must actually seize the property, so as to be able to deliver possession.

TO CONSTITUTE ESTOPPEL IN PAID, there must be an admission inconsistent with the claim set up, an action by the other party upon such admission, and an injury to him by allowing the admission to be disproved.

ACTION founded upon an interpleader.

H. C. Hayden, for the appellant.

E. B. Ewing, Hockaday, and Belch, for the respondent.

By Court, LOVEFACE, J. This action is founded upon an interpleader filed by the plaintiff, Newman, in a suit of attachment commenced by Hook against one A. J. Moore in the Callaway circuit court. The interplea claims certain personal property levied on in the attachment suit as the property of Moore. The evidence shows that in 1860 the sheriff of Callaway County, by virtue of divers executions against Moore, levied upon certain real estate and personal property, including the property in controversy, and sold the same. The property in question consists of certain hotel furniture then belonging to Moore, and used in a certain hotel in the town of

Fulton, known as the Moore Hotel. The sheriff in his evidence says that he levied upon the Moore Hotel and the furniture; that he never took the furniture into possession, nor did he have it at the place of sale; that he sold the hotel and furniture at the court-house over in the town of Fulton, and that William T. Moore and one Locke became the purchasers; that he had not the property in possession at the time of the sale, nor did he deliver the possession to the purchasers either at that time or afterwards. The evidence does not show whether the property was sold along with the hotel, or whether it was sold separately, but the same parties became purchasers of all.

W. T. Moore and Locke afterwards sold the hotel and furniture to Newman, the plaintiff, and A. J. Moore, who up to that time, it seems, had been living in the hotel, pointed out the furniture, and when he moved away left this furniture at the hotel. This was substantially the evidence.

Several instructions were given and refused on both sides, and the case was submitted to the jury, who found for the plaintiff, and judgment entered up accordingly; to reverse which the case is brought here by appeal.

It will be unnecessary to notice any of the instructions given or refused on either side. There are but two questions presented by the record: 1. Did the sheriff's sale pass the title to the hotel furniture to William T. Moore and Locke? and 2. If any title was left in A. J. Moore after the sheriff's sale, are those claiming under him estopped from setting up that title by virtue of the acts of A. J. Moore in pointing out this property to the plaintiff, or otherwise recognizing the validity of the sheriff's sale?

In order that a sheriff may pass title to personal property by virtue of an execution sale, there ought to be a levy, a sale, and a delivery of the property; and to constitute a levy under our statute, there must be an actual seizing of the property. Under the title "Executions," Rev. Code 1855, sec. 74, it is provided that the word "levy," as used in this act, shall be construed to mean the actual seizure of the property by the officer charged with the execution of the writ; and this court, in the case of *Yeldell v. Stemmons*, 15 Mo. 443, held that a sheriff must actually seize the property on a *fiery facias* before he can sell; and that seems to be the plain and unequivocal meaning of the statute. The evidence in this case fails to show that the sheriff was ever at the house where the property was,

or that he ever saw it, or that he pretended in any way to have it under his control. It was not present when it was sold, nor did he attempt to give possession to the purchaser. It does not appear to have been sold separately from the hotel building. It was all sold at the same time and place, and to the same parties. It would be dangerous in the extreme to permit sheriffs to pass the title to personal property upon such sales as this appears to have been. The property of debtors would be sold at a ruinous sacrifice and their debts left unpaid. Purchasers would not bid freely on property that they had no opportunity of examining, and especially when the sheriff was unable to deliver possession, to obtain which might result in a lawsuit that would cost the worth of the property. We think it very clear that W. T. Moore and Locke acquired no title to the personal property in question by reason of the sheriff's sale. On this point, however, there was no error, for the second instruction asked by the defendant, and given by the court, correctly stated the law.

In the second place, we will examine and see whether those claiming under A. J. Moore are estopped from asserting his title by virtue of the declarations and acts of Moore. There is doubt but a party may be estopped from setting up his title to personal property when he has permitted a third person to deal with it as his own, and has encouraged strangers to believe that that third person was the owner, and these strangers acting upon this encouragement have acquired rights in the property; then the real owner will be estopped from asserting his right against such persons as have acquired a title or an interest by reason of his encouragement, for the simple reason that it would be a fraud to permit him to assert his claim against a party who had been induced by his admissions or acts to acquire an interest in the property which he would not otherwise have done. In *Darrell v. Odell*, 3 Hill, 219, it is laid down as the rule in cases of estoppel *in pais* that there must be: 1. An admission inconsistent with the evidence proposed to be given or the claim offered to be set up; 2. An action by the other party upon such admission; 3. An injury to him by allowing the admission to be disproved. This rule was adopted by this court in the case of *Taylor v. Zepp*, 14 Mo. 482.

In the case at bar, the plaintiff, without consulting A. J. Moore, or, so far as the evidence shows, even having any conversation with him at all, purchased the hotel and furniture from W. T. Moore and Locke; and after the purchase was per-

fect, so far as the evidence shows, he went to the hotel, where A. J. Moore was then residing, and Moore pointed out the hotel furniture. The question is, whether this estops Moore or his creditors from asserting Moore's claim to the property. This branch of the case is purely equitable, and the issue ought to have been fairly stated to the jury. The court below in the first instruction offered and its own motion tells the jury that it was necessary for Moore to consent to the sale from W. T. Moore and Locke, or to recognize the same. Now, there may be a vast deal of difference between consenting to a sale before it is made or while it is being made, and recognizing the fact of the sale after it is made. If A. J. Moore had been present when the sale was made, consenting to it, and thereby disclaiming title himself and inducing the plaintiff to purchase, there would be strong reasons in the absence of fraud for estopping his creditors from setting up his title. But the mere fact that he simply acquiesces in the sale made by a stranger of his property ought not to conclude him from setting up his title afterwards, unless he had full knowledge of his title at the time he yielded the possession. The doctrine of estoppels prevents parties from proving the truth, because they have before that either said or acted falsehoods, and third persons have acquired rights upon the faith of those falsehoods being true, and their rights cannot be destroyed by disproving these former statements. Now, what former statements did Moore make to mislead this plaintiff in his purchase? That question, at least, ought to have been submitted to the jury. If Moore had made any former admission with regard to his title calculated to mislead the plaintiff, and that did mislead the plaintiff, in his purchase by inducing him to believe that Moore had no title, then Moore's creditors are estopped, and that is the very issue the jury ought to have found. But this question was not submitted to the jury, or at least not properly submitted; for the instruction given by the court, and before alluded to, was calculated to induce the jury to believe that the sale would be just as binding if recognized by Moore after it was made as it would be if induced by him.

The cause is reversed and remanded for further trial.

The other judges concurred.

WHAT CONSTITUTES VALID LEVY UPON PROPERTY: *Brown v. Pratt*, 65 Am. Dec. 330, and note 333; *Taffle v. Manlove*, 73 Id. 610. Officer must assume dominion over the property: *Goode v. Longmire*, 76 Id. 309.

NECESSITY OF LEVY TO SUSTAIN EXECUTION SALE: *Hamblen v. Hamblen*, 69 Am. Dec. 358, and note 362.

TO CONSTITUTE VALID LEVY ON PERSONAL PROPERTY, the officer must so deal with it as to constitute him a trespasser without the protection of the execution: *Davidson v. Waldron*, 83 Am. Dec. 206, and note 215.

SEIZURE IS INDISPENSABLE TO ENABLE SHERIFF TO SELL LAND and vest a valid title in the purchaser: *Elliott v. Knott*, 74 Am. Dec. 519.

THE PRINCIPAL CASE IS CITED to the first point stated in the syllabus, in *Douglas v. Orr*, 58 Mo. 576; *Bade v. Stephens*, 63 Id. 92.

SAWYER v. HANNIBAL ETC. RAILROAD COMPANY.

[57 MISSOURI, 240.]

CARRIERS OF PASSENGERS ARE NOT INSURERS OF THEIR SAFETY, and are not responsible where all reasonable care, skill and diligence, prudence and foresight, have been employed. They are not liable for mere accident in the absence of any want of that degree of care and prudence which the law requires.

INSTRUCTIONS SHOULD NOT BE SO FRAMED, NOR GIVEN AND REFUSED, as to exclude from the jury the consideration of the points which are fairly raised by the evidence.

TRAVERSE JUROR IS NOT COMPETENT WITNESS TO PROVE misbehavior in the jury.

AMOUNT OF VERDICT IS IMPROPERLY MADE UP where each juror names a certain sum, and the aggregate of the sums specified is divided by the number of the jury.

EXCESSIVE DAMAGES, instance of verdict set aside on ground of.

ACTION for damages for injuries to the plaintiff caused by the alleged negligence of the defendant. The material facts are stated in the opinion.

Carr and H. M. and A. H. Vories, for the appellant.

By Court, HOLMES, J. The cause of action is based wholly on the ground of negligence. A new trial is asked mainly for the reasons that the court below erred in the giving and refusing of instructions, and that the damages were excessive. It is also urged that there was misconduct in the jury respecting the manner in which the verdict was made up. The allegation of negligence in the petition was, that the train of cars was precipitated into the Platte River, and the plaintiff injured, by the negligence and unskillfulness of the officer or agent employed by defendant to manage, conduct, or run the same on the night of the third day of September, 1861, whilst running carelessly, recklessly, and at full speed when danger was or should have been apprehended; that the railroad was at the

time defective and insufficient, by reason of the bridge over the Platte River having been burned down and destroyed between one and five o'clock of the afternoon preceding; and that by reason of such negligence and unskillfulness of the agent or officer of defendant so as aforesaid running, managing, and conducting the said train of cars, and by reason of said defect and insufficiency in the railroad and bridge, the plaintiff suffered the injuries complained of. The answer denied all negligence, and alleged in substance that the bridge had been burned down by the public enemy a few hours previous to the passing of the train; that the section agents along the road in that part, whose duty it was to watch the condition of the track, had been overawed and driven off, so that no notice of the burning of the bridge had come to the knowledge of the officers in charge of the train; and that the defect or insufficiency of the road complained of was not a negligent defect or insufficiency.

It is clear from the evidence that there was no other defect or insufficiency in the bridge or the railroad than what arose from the fact that the bridge had been burned down by the public enemy a few hours previous to the passing of the train. The accident happening solely in consequence of the bridge having been destroyed in this manner, it is plain that this was not what is ordinarily understood by a defect or insufficiency in a railroad. The question of negligence that was really in issue in this trial must be regarded as having reference solely and exclusively to the acts and conduct of the officer who had charge of the train upon that occasion. There was much evidence and some argument in the case touching the operations of the public enemy, the insurrectionary state and condition of the country, the military orders, and the policy of the government with regard to keeping the railroad open, the propriety of the action of the railroad company in continuing to run passenger trains when the railroad and trains were threatened with danger, the duty of the company to take all passengers who offered to go on the road, and the risks which passengers voluntarily undertook in the face of dangers known to them, and for which they were to be held alone responsible. This kind of evidence was not pertinent to the issue, and it should properly have been excluded.

The question was not whether the train should have been run at all on that day, but whether there was any such negligence, or want of care, prudence, and foresight, on the part of

the officer who was engaged in running and conducting the train on the particular occasion as would render the defendant liable for damages for the injuries sustained by a passenger; and on this issue the acts and doings of the public enemy were in no otherwise important than as showing when and how the bridge was destroyed, and that it was done by a power beyond the control of the defendant, or of the officer in charge of the train, or that it was burned down at such a time and under such circumstances that they might and ought to have had knowledge of it, and so were to be held responsible for their ignorance of the fact, as amounting to that degree of negligence, or want of care, diligence, and foresight, which the law required of them. It is a well-established rule of the law of carriers of passengers that where an accident and injury occur by reason of the breakage of carriages, cars, or machinery, or by reason of any defect of construction, or any insufficient condition or state of repair of the railroad or its bridges, these facts alone import some degree of negligence, and make a *prima facie* case of negligence for the plaintiff sufficient to shift the burden of proof upon the defendant: 2 Greenl. Ev., sec. 222. And when the simple facts were shown that a railroad bridge was down, and that the train was precipitated into the chasm, and the plaintiff injured, it may be said that a *prima facie* case for the plaintiff was made out. On that evidence alone there would certainly appear to be a negligent defect or insufficiency in the railroad; but when it was made to appear further that the bridge was down by reason of the sudden inroad and hostile act of the public enemy, and not by reason of any deficiency of construction or any insufficiency in the condition and state of repair of the road, that *prima facie* case, so far as resting upon this ground alone, was completely rebutted and disproved. The only question that would remain for inquiry under this petition would be, whether there had been any negligence, or want of proper care, diligence, skill, and foresight, on the part of the conductor or officer engaged in running, managing, and conducting the train. There was no allegation of negligence in any other officer or agent of the company on this occasion, whether engineer, station agent, or section-man. The evidence tended strongly to show that the men whose duty it was to watch the condition of the road in that part, and report any insufficiency, had been driven off by hostile armed bands of the enemy, so that they, as well as other persons in the neigh-

borhood who had knowledge of the fact, were afraid to risk their lives by undertaking to inform the agents of the company to the east of the bridge of the fact that the bridge had been destroyed; and no such information had reached them. The inquiry was thus narrowed down to the actual conduct of the conductor of the train on such facts as he knew or might have learned by any reasonable diligence in making inquiries. In a case of this kind, it is only on the ground of actual negligence that even a carrier of passengers is to be held liable; the burden of proof is on the plaintiff; and he must establish the fact of negligence by competent evidence, otherwise he cannot recover. Carriers of passengers, not being insurers of their safety, are not responsible where all reasonable care, skill and diligence, prudence and foresight, have been employed: 2 Greenl. Ev., sec. 222; Story on Bailments, sec. 602; Redfield on Railways, 328-329, and notes; *Holbrook v. Utica and Schenectady R. R. Co.*, 12 N. Y. 236 [64 Am. Dec. 502]. They are not liable for mere accident or misadventure any more than for the act of God or the public enemy, for any sudden convulsion of nature, or an unknown or unforeseen destruction, or an unknowable insufficiency of some part of the railroad. In addition to this, there must be some actual negligence, or want of strict care, diligence, and foresight. As to what constitutes such care, diligence, and foresight, or what shall be the standard of judgment in such cases, the law does not seem to have defined any positive and unbending rule. Various expressions are used by different authorities. The terms "utmost," "strictest," "all human," "extraordinary," have been employed; and it has been said by very high authority that "when carriers undertake to carry persons by the powerful and dangerous agent of steam, public policy and safety require that they be held to 'the greatest possible care and diligence'"; and that "any negligence in such cases may well deserve the epithet of 'gross'": *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468. These are very strong, but somewhat indefinite, terms. Numerous decisions have held that the matter of negligence, or care and prudence, is in some degree relative, and that they must be in proportion to the nature, difficulty, and peril of the business: *Nolton v. Western R. R. Co.*, 15 N. Y. 444 [69 Am. Dec. 623]; and it can scarcely mean anything more than such care, diligence, skill, and foresight as careful and prudent men are reasonably expected to exercise in the particular business under like circumstances

of difficulty and danger. More than this would come near to rendering railroad companies liable in all cases of accident and misadventure. Oftentimes after an accident has happened it is easy to see how it might have been avoided; but if the company were to be held liable in all such cases, it would never be safe for them to run a train at all. Care and foresight must be taken in reference to the business, the time, the occasion, and the nature of men, or they can have no definite meaning whatever. In this case, it does not appear that there was evidence of any positive act of carelessness, omission, or remissness of his ordinary functions and duties on part of the conductor, unless it were a lack of the requisite degree of prudence and foresight in view of the dangers to be anticipated ahead on the road. He had no knowledge of the presence of the enemy in force about the bridge, nor of the fact that the bridge had been burnt, nor does it appear that the station agent at Easton had any intimation of that fact, which he might have communicated to the conductor. He seems to have believed that the train had passed the region where danger was most to be apprehended. The train was running at a speed not above fifteen miles an hour, when the card time required twenty miles an hour. A passenger had intimated to him that he had been uneasy all day, and was fearful that something might have been wrong at the bridge which they were approaching, and suggested to him that it would be safer to stop the train before attempting to cross; but he had no particular reason for his apprehension, and the conductor supposed himself to be better acquainted with the actual state of affairs along the road than the passenger. A train had gone safely through the day before, from St. Joseph to Hannibal. More danger seems to have been expected from men firing into the train than from the burning of the bridges, and that peril would be increased by stopping the train. All the circumstances were to be considered, and the question of a reasonable degree of care, prudence, and foresight was a matter for the jury to decide, under the instructions of the court as to the rules of law governing such a question, so far as any such rules have been established.

The instructions which were given for the plaintiffs were expressed in broad and general terms, and so far as they went, laid down the rule accurately enough on the side of plaintiffs. They adopted the language of the best writers on the subject, and they can hardly be considered as in any way materially

objectionable. The instructions given for the defendant, which were also couched in general terms, would seem to be free of serious objection. Of those that were refused, it can scarcely be necessary that we should particularly notice more than the seventh, eighth, ninth, and eleventh. The seventh confined the inquiry to the issue of negligence in running the train of cars on the particular occasion, and told the jury that if the train was conducted and managed with as much care and diligence as a very prudent and careful man would have conducted the same where his own interest and safety were concerned, taking into consideration all the circumstances surrounding the case, and that the injury complained of was the result of mere accident, then the defendant was not liable. This instruction would seem to be entirely correct and proper, and we think it should have been given. It presented a correct view of the question on the side of the defendant, and it enunciated distinctly the important principle that the defendant was not to be held liable for mere accident, in the absence of any want of that degree of care and prudence which the law requires. If it were not the negligence of the conductor, or his want of care and foresight, that was the cause of the accident and injury, proximate or remote, the defendant was not liable. If the burning of the bridge were the act of the public enemy, and the fact were unknown and unknowable to the conductor by the degree of care and foresight propounded in the instructions, then it was the burning of the bridge that was the sole cause of the accident and injury, and in reference to the conductor and the defendant it was pure accident or misadventure.

The eighth instruction was sufficiently in accordance with this last proposition, except in so far as it left out of view the consideration of the question for the jury whether the conductor, in the absence of any knowledge or means of information concerning the burning of the bridge, had exercised the requisite degree of care and foresight in view of the information which he had concerning the state of the country and the probable dangers to be apprehended ahead on the road. This last was a matter for the jury, if there were any evidence before them bearing upon the question. If there were no evidence tending to prove such want of care and foresight, such an instruction might be given; otherwise not. The eleventh instruction contained and submitted this question of care and foresight to the jury in addition to the same matter embodied

in the eighth instruction, and so was free from the same objection; and we think it should have been given. It presented the issue fairly on the side of the defendant, and more definitely than the other instructions, which were given in general terms only. The ninth instruction, in reference to the state of the evidence before the jury, contained a correct proposition of law, and might have been given. We think the defendant was entitled to have the benefit of these instructions. The instructions that were given on either side, indeed, placed the whole issue substantially before the jury, but in the most general terms, and mainly on the plaintiff's side; and by the refusal of these particular instructions for the defendant, undue prominence was given to the plaintiff's view of the case, and the precise and especial ground of the defense was in a great measure withdrawn from the consideration of the jury, thrown into the background, and apparently negatived altogether. Instructions should not be so framed, nor given and refused, as to exclude from the jury the consideration of the points which are fairly raised by the evidence on either side: *Clark v. Hammerle*, 27 Mo. 70.

In support of his motion for a new trial, the defendant produced the affidavit of Jacob Hursch, one of the jurymen, to the effect that the jury had arrived at their verdict by agreeing that each juror should write down the sum which he wished to give as damages, that the aggregate amount should be divided by twelve, and the sum so ascertained should be given as the amount of their verdict; that he was deceived by the fact that some of the jurors under this arrangement put down larger sums than he had anticipated, and that he never would have agreed to the verdict if he had not been bound by his previous agreement. This was undoubtedly an improper mode of making up a verdict, and it would amount to misbehavior on the part of the jury; but the law seems to be settled that a traverse juror cannot be a witness to prove misbehavior in the jury in regard to their verdict; nor can affidavits of jurors be admitted in support of motions to set aside verdicts on such grounds, thus placing the verdict of the jury in the power of a single jurymen: 1 Greenl. Ev., sec. 252 a; *Pratte v. Coffman*, 33 Mo. 71; 1 Waterman's *Graham on New Trials*, 2d ed., 111-115.

Another ground for the motion for a new trial was that the damages were excessive. The evidence shows that the plaintiff was precipitated into the wreck of material, and lay buried

there until morning, amidst wounded and dying men, in a situation of great horror and distress; but her actual injuries were not serious, consisting chiefly of a cut in the scalp, and bruises on the arms and shoulders. She received medical aid for about ten days, and in two or three months was entirely recovered. She was not permanently crippled or disabled, though receiving a severe nervous shock. The damages were six thousand nine hundred dollars. In *Collins v. Albany etc. R. R. Co.*, 12 Barb. 492, this subject received an extended examination. The plaintiff had been injured in the head and foot. The outside of the feet and one toe had to be removed; he was seriously ill for several days, and his life despaired of; he could not be removed home for three months; and he was rendered a cripple for life. The verdict was for eleven thousand dollars, and it was reduced to five thousand. So also in *Clapp v. Hudson River R. R.*, 19 Id. 462, a verdict of six thousand dollars was reduced to four thousand dollars, under condition that a new trial would be granted otherwise. The bone of the plaintiff's leg had been broken between the knee and the ankle, and he had received some flesh wounds in the head. It was four months before he could be carried home, and five months more before he could dispense with the use of crutches; the injury had produced a curvature in the leg, making one leg an inch or more shorter than the other; and it was probable he would be lame for life. After much consideration these verdicts were regarded not only as excessive, but to such a degree as to show that there had been some improper influence operating upon the minds of the jury, whether prejudice, a desire to punish the defendants for the carelessness of their agents, or some misconception of duty, or some perversion of judgment. We think the damages in this case are so exorbitantly excessive, when considered with reference to the actual injuries sustained, and the pain and anguish suffered, for which only the law undertakes to make pecuniary compensation by way of damages, as almost necessarily to imply some misconduct, undue feeling, or prejudice, or some misapprehension of the proper measure and lawful object of damages in such cases. They are excessive enough to raise a strong conviction in our minds that the jury regarded more the terrible nature of the accident than the degree of carelessness which they could properly have attributed to the conductor of the train, or the actual amount of injury sustained by the plaintiff. But on this subject we need do no more than

indicate our opinion. We think the error of the court below in refusing the instructions of the defendant as above pointed out is sufficient to justify a reversal of the judgment.

Judgment reversed and the cause remanded.

WAGNER, J., concurred.

LOVELACE, J., absent.

CARE IMPOSED UPON CARRIERS OF PASSENGERS FOR HIRE: *Warren v. Fitchburg R. R. Co.*, 85 Am. Dec. 700; *Nashville etc. R. R. Co. v. Elliott*, 78 Id. 506; are not insurers of passengers' safety: *Hegeman v. Western R. R. Co.*, 64 Id. 525, note.

INSTRUCTIONS TO JURIES: See *State v. Whit*, 72 Am. Dec. 533, and extended note 538; *Adams v. Capron*, 83 Id. 566; *Gallagher v. Williamson*, 83 Id. 114.

GAMBLING VERDICTS ARE IRREGULAR, AND WILL BE SET ASIDE: *Wilson v. Berryman*, 63 Am. Dec. 78; *St. Martin v. Desnoyer*, 61 Id. 494.

AFFIDAVITS OF JURORS ARE NOT ADMISSIBLE TO IMPROACH VERDICT: *Little v. Birdwell*, 73 Am. Dec. 242, and note 250.

THE PRINCIPAL CASE IS CITED to the point that instructions not covering all the issues are objectionable unless cured by other instructions, in *Budd v. Hofheimer*, 52 Mo. 304.

MINOR v. CARDWELL.

[87 MISSOURI, 350.]

PERSONAL PROPERTY IS GOVERNED BY LAW OF DOMICILE OF OWNER wherever it may be situated, and this law changes with his change of domicile. CHARACTER OF PROPERTY, AS REAL OR PERSONAL, IS TO BE DETERMINED by the laws of the state into which it is removed.

THE opinion states the case.

H. M. and A. H. Vories, and S. A. Richardson, for the appellants.

By Court, WAGNER, J. The decision of this case rests on one single point. By the statutes of Kentucky of 1845-46, entitled "An act to further protect the rights of married women," it was provided that the slave or slaves of a married woman should, after the passage of the act in that commonwealth, be held and taken to be real estate in so far that no slave or slaves, or the increase thereof, which such married woman should have at the time of her marriage, or which should come, descend, or be devised to her during her coverture should be liable for the debts of the husband, or be attached, levied on, and sold for his debts or liabilities of any

sort or kind, nor should the husband's life estate in the slaves of the wife, the wife living, be levied on and sold to pay such debts and liabilities.

By our law, slaves were personal property, and slaves belonging to the wife became the absolute property of the husband, and were liable to be levied on and sold under execution in like manner as other personal property for his debts. The question is, whether slaves which were held by a married woman in Kentucky under the operation of the law of 1845-46, and which were invested with the character of real estate by local law, and exempt from levy and sale for the husband's debts, are to be considered as held in the same manner and with like conditions and exemptions when brought by their owner to this state. In other words, after they are transferred to our jurisdiction by the voluntary act of the owner, is their *status* to be determined by the laws of Kentucky or Missouri?

It may be stated as a general rule that laws have no force by their own proper vigor beyond the territory or state by which they are made, excepting for some purposes, the high seas or lands over which no state claims jurisdiction. Beyond or outside of this limit they can claim no sanction; obedience cannot be compelled, nor disobedience punished. Mr. Justice Story lays down the doctrine that the laws of every state affect and bind directly all property, whether real or personal, within its territory; and all persons who are resident within it, whether natural-born subjects or aliens; and also all contracts made and acts done within it: Story on Conflict of Laws, sec. 18. No state can by its own laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others. This is a natural and necessary consequence of the foregoing proposition; for it would be wholly incompatible with the independent equality and exclusiveness of the sovereignty of nations that any one nation should be at liberty to regulate either persons or things not within its own territory; and hence it follows as a necessary corollary that whatever force and obligation the laws of one country have in another depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent: *Id.*, sec. 23.

But by the universal practice of civilized countries, by the comity of nations, the laws of one will be recognized and executed in another where the rights of individuals are concerned.

It is so with cases of contracts made in foreign countries; and courts of justice always expound and execute them according to the laws of the place in which they were made, provided they do not contravene the express municipal regulations, or are not repugnant to the policy of their own country: *Bank of Augusta v. Earle*, 13 Pet. 519, 589, *per* Taney, C. J.

This comity is the purely voluntary act of the nation or state, and is totally inadmissible when contrary to its policy or prejudicial to its interests. In *Olivier v. Townes*, 2 Martin, N. S., 93-102, a contest arose in regard to the sale and transfer of a ship by a resident of Virginia, the ship at the time of the sale being locally in New Orleans; and before there was any delivery, she was attached by the creditors of the vendor.

By the laws of Virginia, where the vendor lived and the sale took place, no delivery was necessary to complete the sale; but by the laws of Louisiana, where the ship, the subject-matter of the contract, was locally situated, the sale was invalid unless accompanied with delivery. It was therefore a case of conflict of rights between the creditor and the purchaser. It was contended that by the laws of all civilized countries the alienation of movable property must be determined according to the laws, rules, and regulations in force where the owner's domicile is situated. But Porter, J., in an opinion of great learning and ability, combated the position, and declared that where there was a clash or conflict in such a case, the comity must give way, and the laws of the place where the property may be must prevail. He concludes: "However anxious we may be to extend courtesy and afford protection to the people of other countries who may come themselves or send their property within our jurisdiction, we cannot indulge our feelings so far as to give a decision that would let in such consequences as we have just spoken of. It would be giving the foreign purchaser an advantage which the resident has not; and that frequently at the expense of the latter. This, in the language of the law, we think would be a great inconvenience to the citizens of the state, and therefore we cannot sanction it."

A testator having his domicile in the state of Mississippi died possessed of slaves there, and directed in his will that if either of his two sons, to whom he bequeathed his property, should die "without a lawful heir," his part, real and personal, should go to the survivor. Each son received his portion, and one removed with his slaves into Louisiana, and died "with-

out a lawful heir." It was determined that although by the law of the testator's domicile the survivor might have had a title to such slaves, yet as by the law of Louisiana testamentary substitutions were prohibited, the survivor's claim could not be enforced in the latter state: *Harper v. Stanbrough*, 2 La. Ann. 377; *Harper v. Lee*, 2 Id. 382. And in *Mahorner v. Hoos*, 9 Smedes & M. 247 [48 Am. Dec. 706], a person domiciled in Virginia by his last will and testament, made and executed in that state, directed that certain of his slaves, then being in Mississippi, should be emancipated and sent to Africa. By the law of Virginia such a disposition was valid; by the law of Mississippi it was not. The courts of the latter state held the will void and inoperative as to the slaves in that state, because it contravened the public policy of the state as declared by an express statute, and was not embraced in the general rule of comity regulating the law of the domicile.

The principle is so well established that it will hardly be questioned by any one, that personal or movable property is governed by the law of the domicile of the owner, wherever it may be situated, and this law of course changes with his change of domicile. To say that the slaves were real estate here is to import the law of Kentucky into this state, and make it operate *ex proprio vigore* in opposition to the well-settled rule of our own law. The case does not come within the meaning of the terms or the principles where the *lex loci contractus* governs. It is an attempt to bring property within our jurisdiction, and hold it by virtue of a foreign law, in a manner and by a tenure different from what is recognized by our own rules and regulations.

It is competent for a state by legislative enactment to declare that carriages or other personal property shall be deemed to be of the nature of real estate, and so held, and shall be devised and descend in the same way. But if that property was brought from such state into our territory, would our courts be bound, or even warranted, in making a distinction between that and other property of a like kind to the detriment of the interests of our citizens?

It is believed the comity of nations has never been carried to this extent. There is nothing to distinguish the law by which property in slaves was formerly owned in this country from that which was applicable to other property. Slaves being regarded by our law as merely personal property, as

soon as they were brought here they were remitted to that condition, without considering the nature or character of the laws by which they were held in the country whence they came.

The judgment is reversed and the cause remanded.

HOLMES, J., concurred.

LOVELACE, J., absent.

MOVABLE PROPERTY IS SUBJECT TO LAW OF DOMICILE: *McLean v. Herdin*, 69 Am. Dec. 740, and note 742; *Owen v. Miller*, 75 Id. 502, and note 508; *Townes v. Durbin*, 77 Id. 176.

THE PRINCIPAL CASE IS CITED to the point that in administration the real situs of the assets is where the debtor resides and the assets are located, in *Partnership Estate of Henry Ames & Co.*, 52 Mo. 293.

NAVE v. HOME MUTUAL INSURANCE COMPANY.

[87 MISSOURI, 430.]

INSURANCE UPON BUILDING COVERS IT AS SUCH, and not the materials composing it. And the insurer is not liable for the loss where the building falls from defect of construction or from overloading, and the materials are subsequently burned.

THE opinion states the case.

Grover, Sharp, and Broadhead, for the appellant.

Glover and Shepley, for the respondents.

By Court, HOLMES, J. It was conceded that there was evidence in the case tending to show that the building which was the subject insured, being used as a store and warehouse, and the floors being heavily loaded with merchandise, by reason of the overloading or of some defect of construction, before the happening of the fire, and without any agency of fire, fell down and became a mass of rubbish; and that the fire which occasioned the loss afterwards arose in the fallen materials. There was evidence also, as it was admitted, tending to support the petition.

The court instructed the jury that if the building was destroyed by fire as alleged in the petition, the plaintiffs were entitled to recover; and refused to instruct for the defendant that if the house fell down before the fire, and the fall of the house caused the fire, or the fire was caused by the house falling upon matches or other combustibles, they should find for the defendant.

An instruction was given for the defendant to the effect that if the house fell before the fire the defendant was only liable for the damages actually occasioned by the fire, and not for that occasioned by the fall. On the facts supposed; we are clearly of the opinion that the defendant's instruction ought to have been given. The subject insured had ceased to be such, and became a mere congeries of materials, before the fire occurred, and by reason of a cause not insured against in the policy. The maxim, *Causa proxima non remota spectatur*, has no application to such a case. If the fire had been the immediate cause of the destruction and the loss, then the remote causes of the fire might have been immaterial. The cause of the loss of the subject insured was not the fire, but the fall. That a fire sprang up afterwards in the rubbish, and destroyed the fallen materials, was wholly another matter. The materials were not insured. The building insured no longer existed as such, and it ceased to exist by reason of a peril not insured against.

The fire must be the efficient cause and the loss the direct effect of the fire: 1 Phillips on Insurance, 625.

The instruction which was given for the defendant proceeded upon an erroneous view of the defendant's liability, and might as well have been refused with the rest.

Judgment reversed and cause remanded.

The other judges concurred.

POLICY OF INSURANCE ON BUILDINGS AND FURNITURE THEREIN IS INDIVISIBLE, and if made void by the assured as to any of the items of property insured, the whole policy is void: *Barnes v. Union etc. Ins. Co.*, 81 Am. Dec. 562.

WANN v. WESTERN UNION TELEGRAPH COMPANY.

[87 MISSOURI, 472.]

TELEGRAPH COMPANIES MAY SPECIALLY LIMIT THEIR LIABILITIES, but will not be protected from the consequences of gross negligence.

IT IS NOT UNREASONABLE FOR TELEGRAPH COMPANIES TO REQUIRE REPE-
TITION of message, or otherwise the company will not be liable for any
error in its transmission.

ACTION for damages for alleged carelessness in transmitting telegram. The opinion states the case.

Knight, for the appellant.

Hill and Jewett, for the respondent.

By Court, WAGNER, J. This was an action instituted to recover damages for alleged carelessness of the Western Union Telegraph Company in transmitting a dispatch for plaintiff from St. Louis to New York City. The dispatch, as sent by plaintiff to his correspondent in New York, ordered them to ship to him at St. Louis certain quantities of salt by "sail," and when it reached New York and was delivered it read, ship by "rail"; that is, the word "rail" was substituted for the word "sail" in the original dispatch. Accordingly, a large proportion of the salt was forwarded by railroad instead of by canal and lake, as was originally intended by the dispatch. The shipping by railroad was much more expensive than by water, and the action was brought to recover the difference between the two modes of transportation. A judgment was rendered in the court below for the plaintiff for the sum of \$1,085.44; and to reverse this judgment, the case is brought here by appeal.

The defendant resists the recovery on the ground that all dispatches were sent over its lines on the following conditions, which, it appears, the plaintiff had knowledge of:—

"Terms and Conditions on Which Messages are Received by the Company for Transmission.—The public are notified that, in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated, by being sent back from the station at which it is to be received to the station from which it is originally sent. Half the usual price for transmission will be charged for repeating the message; and while this company will, as heretofore, use every precaution to insure correctness, it will not be responsible for mistakes or delays in the transmission or delivery of repeated messages beyond an amount exceeding five hundred times the amount paid for sending the message, nor will it be responsible for mistakes or delays in the transmission of un-repeated messages, from whatever cause they may arise, nor from delay arising from interruptions in the workings of its telegraphs, nor for any mistakes or omissions of any other company over whose lines the message is to be sent to reach the place of its destination. All messages will hereafter be received by this company for transmission subject to the above conditions."

The message was not ordered to be repeated.

Our statute under which the company is incorporated declares that it shall be the duty of the company, "on payment

or tender of the usual charge, according to the regulations of the company, to transmit all dispatches, with impartiality and good faith, in the order of time in which they are received," etc. And such companies are made liable "for special damages occasioned by the failure or negligence of their operators or servants in receiving, copying, transmitting, or delivering dispatches": Rev. Code 1855, p. 1521, secs. 5, 6. The court has never before been called on to construe this statute, and the transmitting and communicating intelligence by means of the electric telegraph being of comparatively recent invention, but few adjudications have been made in respect to the liabilities of telegraph companies. In California, in *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422 [73 Am. Dec. 589], the court seems to have applied the doctrine governing the liability of common carriers to telegraph companies. But in the California case, as well as the Maryland case, *Birney v. York & W. P. T. Co.*, 18 Md. 341 [81 Am. Dec. 607], to which reference has been made, there was not merely negligence, but an entire omission on the part of the operators of the companies to perform their duties. In the former, the dispatch was not sent until the day after it was received, in consequence of which delay the plaintiff lost a debt; in the latter, the dispatch was forgotten, and was not sent at all. But the Maryland court repudiates the doctrine that a telegraph company is a common carrier, and assumes that it is a bailee, and that a party sending messages by telegraph, knowing that the engagements of the company are controlled by certain rules and regulations, ingrafts them in contract of bailment, and is bound by them; and that rules exempting the company from liability for the non-transmission and non-delivery of unrepeatd messages do not apply to a case where no effort is made by the company or its agents to put a message on its transit.

In the Kentucky case, *Camp v. Western U. T. Co.*, 1 Met. (Ky.) 164 [71 Am. Dec. 461], the telegraph company had published notice in the precise language used by the defendant here, and copied in this opinion. The plaintiff sent a message over its lines without ordering it to be repeated, or paying for having the same done. A mistake occurred in its transmission, whereby he lost one hundred dollars. The court held that the condition was reasonable, and the defendant was not liable. The case of *McAndrew v. Electric Telegraph Company*, 7 Com. B. 8, is in point, and is ably reasoned. The

statute 16 and 17 Victoria embodies a provision similar to ours in regard to telegraph companies, and the company there had given notice of which the one here is almost an identical transcript. The plaintiff delivered an unrepeatable message to be transmitted over the company's line, directing a certain ship to proceed to Hull. By mistake, when it was received it directed the ship to proceed to Southampton. On account of this mistake the plaintiff was injured in disposing of his cargo, and brought his action to recover damages; but the court said the condition was reasonable, and there was no objection to the company availing itself of the same protection that other persons in a similar position are entitled to do by law, by limiting its liability by fair and reasonable conditions, notice of which is duly brought home to the parties contracting with it.

Whether we regard telegraph companies as common carriers or as bailees, we see no reason why they may not specially limit their liabilities, subject to the qualification, however, that they will be protected from the consequences of gross negligence. Deny them this right, and they will be utterly unable to protect themselves against the hazards and risks which are incident to the business in which they are engaged. We see nothing unreasonable in their declaring they will not be responsible for unrepeatable messages.

We think this description of liability comes within the intention of the regulations provided for in the statute. The system of telegraphing, however perfect it may be, is seriously affected by atmospheric causes, which are uncontrollable; and if a man wants to send a message of an important character, prudence and wisdom would seem to dictate that he should have it repeated, in order to be assured of its correct transmission. And as the repetition imposes additional labor, it is surely justice that an enhanced price should be paid. If the company undertake to insure the accuracy of the message, and assumes additional risk, it should be paid accordingly.

The message sent by the plaintiff was one of importance; he could have demonstrated its perfect correctness by having it repeated at a trifling sum, and he was fully cognizant of the regulations of the company.

The first, third, and fourth instructions prayed for by defendant should have been given, and the last paragraph of the instructions given for the plaintiff should have been refused.

The judgment is reversed, and the cause remanded.

HOLMES, J., concurred.

LOVELACE, J., absent.

THAT TELEGRAPH COMPANIES ARE COMMON CARRIERS, and subject to the law governing such carriers, see *Parks v. Alta Cal. Tel. Co.*, 73 Am. Dec. 589, and note 593. But see *Birney v. Printing Tel. Co.*, 81 Id. 607, holding that a telegraph company is a bailee; and see Id. 614, note.

REGULATION THAT TELEGRAPH COMPANY WILL NOT BE RESPONSIBLE FOR MISTAKE in transmitting a message unless the same is repeated and an additional sum paid therefor is just and reasonable: *Camp v. Western U. Tel. Co.*, 71 Am. Dec. 461; and see extended note on the "power of telegraph companies to impose conditions upon senders of messages," Id. 463.

REGULATIONS OF RAILROAD COMPANY MUST, under certain circumstances, be regarded as entering into and forming part and parcel of a contract made with the company: *Martindale v. Kansas City etc. R. R. Co.*, 60 Mo. 510, citing the principal case.

HUELSENKAMP v. CITIZENS' RAILWAY COMPANY.

[37 MISSOURI, 587.]

CARRIERS OF PASSENGERS ARE NOT INSURERS, but are bound to the utmost care and skill in the performance of their duty. And the carrier will be liable for an injury mediately or immediately caused by its negligence, the party injured not having directly contributed by his negligence to the injury.

ACTION by the plaintiff to recover damages, under the statute, for the death of her husband, caused by the alleged carelessness of the defendant's agents in the management of the defendant's street-railroad cars. The deceased was riding on the platform of one of the defendant's cars in the night-time, and was crushed and killed by coming in contact with a stationary car of the defendants which was standing on a switch, and near the railway track. Other facts appear in the concluding paragraph of the opinion. The plaintiff had a verdict, a motion by the defendant for a new trial was overruled, and his request for an appeal was granted.

Sharp and Broadhead, for the appellant.

Cline and Jamison, for the respondent.

By Court, WAGNER, J. In the discussion of this case at the bar, the counsel took an exceedingly wide range, examining at length the doctrine applicable to the law of carriers, and also of contributory negligence. It may be conceded that the law in reference to the liabilities and responsibilities of carriers of

passengers is now well understood and defined. They are not, as in the case of carriers of goods, insurers and responsible for all damages which do not fall within the excepted cases of the acts of God and the public enemy, but they are bound to the utmost care and skill in the performance of their duty. The degree of responsibility, therefore, to which carriers of passengers are subjected is not ordinary care which will make them liable only for ordinary neglect, but extraordinary care which renders them liable for slight neglect. Public policy and safety require that they should be held to the greatest possible care and diligence, and that the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents: *Angell on Corporations*, sec. 568; *Ingalls v. Bills*, 9 Met. 1 [43 Am. Dec. 346]; *Stokes v. Saltonstall*, 13 Pet. 181; *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 486; *Steamboat New World v. King*, 16 Id. 469. But the principal ground relied on by the appellant in resisting a recovery is, that the deceased was guilty of negligence, and contributed to the accident which resulted in his death; and that where both parties are in fault the plaintiff cannot recover. Perhaps no question has been more discussed and litigated in the courts of late years than this very question of what will amount to such fault or negligence as will preclude a party from maintaining an action for an injury. Where a person was injured by an obstruction placed in the highway, against which he fell, and brought his action to recover damages against the person who caused the obstruction, Lord Ellenborough said: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff": *Butterfield v. Forrester*, 11 East, 60. In *Galena etc. R. R. Co. v. Yarwood*, 15 Ill. 468, a passenger was taken on the train to be transported for a short distance, and was told that the passenger-cars were full, and that he must ride in the baggage-car; and having entered the baggage-car, he then commenced playing and scuffling with two fellow-passengers, and in the course thereof ran from the baggage-car into the passenger-car, and the train being thrown from the track, rushed out at the forward end of the latter car and jumped from the platform, by which his leg was broken. It was held that it was culpable negligence in him to put himself in that position contrary to the terms on which he was

received as a passenger, which made the leap necessary to escape the peril, and that consequently he was not entitled to recover. And if a man chooses to ride on a railroad with his head and arms out of the car window, and in passing a dangerous place in the road disregards an audible warning by the conductor of the danger of putting his head or limbs outside the car, and will not ride like a prudent man, he will have to bear the consequences of his foolishness. So where a lunatic was traveling in the cars upon a railroad in company with his father, who had paid the fare for both and taken tickets, the father got out at a stopping-place to procure refreshments, leaving his son in the cars without giving notice to any one of his situation, and while absent the train started. On regaining the cars the father did not find his son where he had left him, the latter having changed his seat. The conductor in the absence of the father applied to the lunatic for his ticket, not knowing him to be insane or that his fare had been paid. The lunatic refusing to deliver his ticket, the conductor caused the train to be stopped and the lunatic to be put off the cars, in consequence of which the lunatic was run over by another train of cars and killed. The evidence not showing any negligence or want of care on the part of the conductor, but showing great negligence and imprudence in the conduct of the lunatic and his father, it was held that an action could not be maintained by the personal representatives of the lunatic against the railroad company under the New York statute authorizing the recovery of damages in cases of death by the wrongful act, neglect, or default of another: *Willets v. Buffalo etc. R. R. Co.*, 14 Barb. 585. The case of *Chamberlain v. Milwaukee etc. R. R. Co.*, 7 Wis. 425, is not an authority to the extent contended for by the counsel for the appellant. There the court which tried the case instructed the jury that the fact that the plaintiff was on the train and was injured by being thrown off and run over would of itself constitute a *prima facie* case in which the plaintiff would have the right to recover. The court held that this instruction was erroneous, and said the accident might have happened by his own want of ordinary care and prudence while upon the top of the cars at the brake, and under such circumstances as would exonerate the company from all blame in the premises. But that if he could show he was exercising ordinary care and diligence, and he was injured by the carelessness and negligence of the servants of the company, he would be entitled to

damages, and that he must also show that his own negligence did not contribute to the injury.

Where there is a choice of positions upon a railroad, either of which a passenger may lawfully take, he is not obliged to select that which is the least dangerous. Thus in *Carrol v. New York etc. R. R. Co.*, 1 Duer, 571, the plaintiff was injured by a collision of two trains running in opposite directions. The plaintiff was at the time of the collision in the post-office department in the baggage-car, being lawfully there, and with the acquiescence of the conductor. It was a much more dangerous location on the happening of such a collision as took place than a seat in the passenger-cars, and he knew the fact, and had he been in the passenger-car he would not have been injured. It was held that negligence is the violation of the obligation which enjoins care and caution in what we do, and that the plaintiff, not being under any obligation to be more prudent and careful than he was, in contemplation of there possibly being such culpable conduct on the part of the defendant as would endanger his life if he remained where he was, and his personal safety on any part of the train, and not being a trespasser, was not to be precluded from his action because he might have selected a position of comparative safety. And though a passenger may have been upon the cars in violation of the rules of the railroad company, yet if it appears to the jury that these rules have been waived or revoked in his favor, he will nevertheless be entitled to his action for his injuries suffered from any want of care on the part of the company: *Great N. W. R. R. Co. v. Harrison*, 28 Eng. L. & Eq. 443; *Collett v. London & N. W. R. R. Co.*, 6 Id. 305. We take the correct rule to be, that to the liability of a railway company as a passenger carrier two things are requisite: that the company shall be guilty of some negligence which mediately or immediately produced or enhanced the injury, and that passengers should not have been guilty of any carelessness and imprudence which directly contributed to the injury, since no one can recover for an injury of which his own negligence was in whole or in part the proximate cause; and although the plaintiff's misconduct may have contributed remotely to the injury, if the defendant's misconduct was the immediate cause of it, and with the exercise of prudence he might have prevented it, he is not excused: *Redfield on Railways*, 2d ed., sec. 150, pp. 330, 331; *Robinson v. Cons.*, 22 Vt. 218 [54 Am. Dec.

67]; *Mudge v. Goodwin*, 5 Car. & P. 190; *Zemp v. W. & M. R. R. Co.*, 9 Rich. 84 [64 Am. Dec. 763].

The general rule of law in regard to what negligence will prevent a plaintiff from recovering was much discussed in a recent case in the English exchequer, and the principle arrived at was substantially the same as that laid down above. It seems from the report that the plaintiff had fettered an ass so that it could not escape, and left it in the highway, and that the defendant negligently drove his horses and wagon against the ass and killed it. Lord Abinger, C. B., in delivering the opinion of the court, said: "The defendant had not denied that the ass was lawfully in the highway, and therefore we must assume it to be lawfully there; but even were it otherwise it would have made no difference, for as the defendant might by proper care have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there." And Parke, B., added: "The judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that if they were of the opinion that it was caused by the fault of the defendant's servant in driving too fast, or which is the same thing, at a smartish pace, the mere fact of putting the ass on the road would not bar the plaintiff of his action. All that is perfectly correct, for although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road": *Davies v. Mann*, 10 Mees. & W. 545. The same doctrine is declared and enforced in the queen's bench: *Lynch v. Nurdin*, 1 Q. B. 29. In the very able and carefully considered case of *Beers v. Housatonic R. R. Co.*, 19 Conn. 566, the question is critically examined, and many of the authorities referred to, and the court say that there having been negligence on the part of the defendants, it was not sufficient for them, in order to excuse themselves, to show merely that there was a want of care on the part of the plaintiff, unless it was a want of such a degree of care as it was incumbent on the plaintiff to exercise. In other words, if the plaintiff exercised all the care that the law required of him,

the defendants cannot deliver themselves from the effect of negligence on their part. Otherwise the plaintiff would be left without redress for an injury wrongfully inflicted on him by the defendants, when the former had been guilty of no want of duty.

The rational rule, and the one as we think established by the best authorities, in reference to the care incumbent on the plaintiff is, that it must be ordinary care, as it is termed, which, as stated by Lord Denman, interpreting that phrase as used by Lord Ellenborough, means "that degree of care which may reasonably be expected from a person in the plaintiff's situation," and is synonymous with reasonable care. It would seem that the principle that one who had himself used reasonable care, but had notwithstanding suffered an injury from the negligence of another, should have redress for that injury, is so obviously just that it carries with it its own vindication. But it does not rest on its own inherent reasonableness. The authorities in support of it are numerous and explicit, and although it has been supposed that the cases go so far as to decide that the want of any degree of care whatever, however great, on the part of the plaintiff, concurring with the negligence of the defendant, will preclude a recovery by the former, we are satisfied after a careful examination of all the cases that no well-considered case, perfectly understood, sustains that position, without scrutinizing in detail the cases which are deemed to favor this doctrine.

It will be apparent on an examination of them that this erroneous impression has arisen from a want of precision in some of them in the manner of laying down the rule which was deemed applicable to them by the judges, and from an incorrect apprehension of their language in others. It will be found in looking at the circumstances of these cases that the fault or negligence of the plaintiff to which the judges alluded as being that which would preclude a recovery if it concurred with the negligence of the defendant consisted, not of the least degree of negligence, but of such a degree as would amount to the want of ordinary or reasonable care, and that although it was not characterized by those terms, it was obviously the degree of negligence or fault which was intended. And in several of them the right of the plaintiff to recover is expressly placed on the question whether he exercised a reasonable care to avoid the consequences of the defendant's negligence. In further support of the rule heretofore laid down,

we refer to the case of *Trow v. Vermont Central R. R. Co.*, 24 Vt. 487 [58 Am. Dec. 191], where the question is examined and the principle sustained. The court remarks: "This leads our investigation to the question whether an action can be sustained when the negligence of the plaintiff and the defendant have mutually co-operated in producing the injury for which the action is brought. On this question the following rules will be found established by the authorities: Where there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained. In the use of the words 'proximate cause' is meant negligence occurring at the time the injury happened. In such case, no action can be sustained by either, for the reason 'that, as there can be no apportionment of damages, there can be no recovery.' So where the negligence of the plaintiff is proximate, and that of the defendant remote or consisting in some other matter than what occurred at the time of the injury, in such case no action can be sustained, for the reason that the immediate cause was the act of the plaintiff himself. Under this rule falls that class of cases where the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time of its commission. These principles are sustained by *Hill v. Warren*, 2 Stark. 377; *Munroe v. Leach*, 7 Met. 274; *Parker v. Adams*, 12 Id. 415 [46 Am. Dec. 694]; *Brownell v. Flagler*, 5 Hill, 282; *Brown v. Maxwell*, 6 Id. 592 [41 Am. Dec. 771]; *Williams v. Holland*, 6 Car. & P. 23. On the other hand, when the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled in England and in this country. Therefore if there be negligence on the part of the plaintiff, yet if at the time the injury was committed it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury." And the same rule is established and maintained in Georgia. In an action for killing a slave, the defense was that the slave's negligence contributed to the injury, but the supreme court, per Lumpkin, J., say: "It is insisted that if the injury in this case resulted in whole or in part from the misconduct of the plaintiff's servant, that he cannot recover; and this seems to have been the rule laid down in *Butterfield v. Forrester*, 11 East, 60, and *Luxford v. Large*, 5 Car. & P. 421. But this doctrine has been modified in later cases, and in *Lynch v.*

Nurdin, 1 Q. B. 29, it was held that the defendant was liable in an action on the case though the plaintiff was a trespasser and contributed to the mischief by his own act. And this case has been followed in *Robinson v. Cone*, 22 Vt. 213 [54 Am. Dec. 67], and *Birge v. Goodwin*, 19 Conn. 507, and numerous other adjudications in this country. We approve of this modification of the principle, and think that it ought to be left to the jury to say whether, notwithstanding the imprudence of the plaintiff's servant, the defendant could not in the exercise of reasonable diligence have prevented a collision": *Macon & W. R. R. Co. v. Davis*, 18 Ga. 679.

Now, in the case under consideration, the evidence shows that the railway company were in the habit of carrying passengers on the platforms of its cars, and collecting fare for the same. The position in which the deceased placed himself was perhaps unsafe, but it was not prohibited; and the evidence further shows that owing to the crowded state of the cars there was no other place he could take. Had there been any objection to carrying him in that manner, it would have been competent for the company or its employees to have put him off the car; but not having done so, they were bound to carry him with skill, prudence, and care. There is nothing to show that he failed to exercise ordinary prudence and care. He might in all probability have avoided the catastrophe by being on the alert and exercising extraordinary vigilance, but such was not required of him. He stood within a few feet of the driver, and the driver knew, or at least it was his duty to know, the close proximity of the cars when they were about to collide, and also the position of the passengers on the platform. His driving steadily ahead under such circumstances stamps the act with recklessness and gross negligence. The question of negligence was for the jury, and was properly submitted to them under instructions which fairly and correctly presented the true issue in the case and the law arising thereon. The instructions given by the court for the respondent and the appellant, when taken together, are objectionable, and properly apply the law to the case. It was not error in refusing the additional instructions asked for by the appellant, as the whole matter had been already fairly presented.

Judgment affirmed.

HOLMES, J., concurred.

LOVELACE, J., absent.

THE PRINCIPAL CASE IS OTTED to the point that although a person be injured while unlawfully on the track of a railroad company, or contributes to the injury by his own negligence, yet if the injury might have been avoided by the use of ordinary care and caution by the railroad company, it is liable for damages for the injury, in *Brown v. Hannibal etc. R. R. Co.*, 50 Mo. 467; and is cited to the point that when the proof does not present a clear case of negligence so as to amount to negligence in law, the question should be left to the jury under suitable instructions, in *Smith v. Union R. R. Co.*, 61 Id. 592.

GERHARDT v. BOATMAN'S SAVING INSTITUTION.

[83 MISSOURI, 60.]

PRINCIPAL IS LIABLE TO THIRD PERSONS IN CIVIL SUIT FOR FRAUDS, DECEITS, CONCEALMENTS, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them.

NOTARY PUBLIC IS MADE AGENT OF BANK, AND ONE OF ITS OFFICERS, where the bank appoints him by the year to do all of its notarial business, and requires of him a bond for the faithful discharge of his duties.

BANK RECEIVING PROMISSORY NOTES FROM ITS DEPOSITORS FOR COLLECTION IS RESPONSIBLE FOR NEGLIGENCE OF NOTARY, who has been constituted its agent, in failing to give notice to an indorser of a negotiable promissory note of a demand upon and refusal of payment by the maker, and by which the maker was discharged. The notary, in such a case, does not act in the character of an independent officer in the performance of a duty imposed upon him by law.

THE facts are stated in the opinion.

Gray, for the appellant.

Lackland, Cline, and Jamieson, for the respondent.

By Court, WAGNER, J. The facts in this case are mainly these: The plaintiff kept his regular deposit account with defendant, and in accordance with a uniform custom, delivered to it a negotiable promissory note for collection. The note was for two thousand five hundred dollars, made by Henry L. Clark, payable sixty days after date to the order of Lewis V. Bogy, and by Bogy indorsed to plaintiff, who indorsed the same and delivered it to defendant for the purpose above stated. The note, not being paid at maturity, was delivered by defendant to a notary public for protest, and to give notice of presentment, demand, and refusal to pay to the indorser. The notary was appointed by the defendant to do all its nota-

rial business; and it had required him to give bond in the sum of ten thousand dollars for the faithful discharge of his duties. He proceeded to protest the note for non-payment, but through his negligence and carelessness in giving notice, the indorser was discharged. The maker was insolvent, and this suit is now brought to charge defendant for the negligence of the notary it employed, and through whose instrumentality recourse was lost against the indorser.

The sole point here is, whether the defendant is liable for the negligence, inefficiency, and carelessness of the notary, acting as its agent. The question has often been determined in other courts, but the decisions are so conflicting and contradictory that it cannot be said that any rule can be positively deduced from the weight of authority.

It is not doubted that it is the usual custom of banks, in receiving notes on deposit for collection, to hand them over to a notary to make demand and protest against the maker, and give notice to the indorser in default of payment at maturity. And therefore it has been held that where a party cognizant of this custom deposits a note for collection, and payment is not made when the same becomes due, and it is regularly delivered to a notary, and he omits to give notice to the indorser of non-payment, the bank, having discharged its entire duty, will not be responsible, but the remedy will be against the notary.

The best considered case that we have met with holding the banks exempt from liability is *Bellemire v. Bank of United States*, 1 Miles, 173, affirmed on appeal in 4 Whart. 105 [33 Am. Dec. 46]. It was there said that the bank should be regarded as having undertaken to collect the note in the customary mode, and that the holder of the note must be understood to have consented to the arrangement; consequently, on default of payment by the maker, it became the duty of the bank to call to its aid the notary, and intrust to him the performance of whatever was necessary to secure the responsibility of the indorsers. And it was moreover declared that the notary being a public officer, he and his securities on his official bond as notary were liable to the parties injured by his neglect, but not the bank or person who directly employed him. And this decision has been followed in many cases, though not always for precisely the same reasons: *East Had-dam Bank v. Scovill*, 12 Conn. 303; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *Citizens' Bank v. Howell*, 8 Md. 530 [63

Am. Dec. 714]; *Bowling v. Arthur*, 34 Miss. 41; *Hyde v. Planters' Bank*, 17 La. 560 [36 Am. Dec. 621].

But on the other hand, the bank is held liable for all the acts and omissions of the notary or other agent to whom it delivers the notice. The leading case on this side of the question is *Allen v. Merchants' Bank*, 22 Wend. 215 [34 Am. Dec. 289], in the New York court of errors and appeals, where the whole subject is most elaborately considered, and discussed with masterly ability by Senator Verplanck. In the course of his opinion, that learned jurist said:—

“It is well settled in this state that there is an implied undertaking by a bank or banker receiving negotiable paper deposited for collection to take the necessary measures to charge the drawer, maker, or other proper parties upon the default or refusal to pay or accept: *Smedes v. Bank of Utica*, 20 Johns. 372; S. C. in this court, 3 Cow. 663; *McKinster v. Bank of Utica*, 9 Wend. 46; S. C., 11 Id. 473. The ground of this rule is, that the acceptance of negotiable paper thus deposited for collection forms an implied undertaking to make the demands and give the notices required by law or mercantile usage for the perfect protection of the holder's rights against all previous parties; for which undertaking the use of the funds thus temporarily obtained, or of the average balances thereof for the purposes of discount or exchange, forms a valuable consideration. Had we no express authority on this head, I should hold the acceptance by a bank of paper for collection from a customer in the usual course of his business as sufficient evidence of a valuable consideration. The whole ordinary business of a bank with its dealers is one of mutual profit or accommodation, and it must be taken together (unless some part is separated by express understanding), and it is not for a bank to allege or for a court to consider that a collection in a particular place must be regarded as a gratuitous favor. If accepted at all, the general profits and advantages of the business of which this may perhaps be an unproductive part form a good consideration for the undertaking. This, however, is not an open question after the decision of this court in the two cases against the Bank of Utica. What, then, is the ordinary undertaking, contract, or agreement of a bank with one of its dealers in the case of an ordinary deposit of a domestic note or bill payable in the same town received for collection? It is a contract made with a corporate body having only a legal existence, and governed

by directors, who can act only by officers and agents; or if it be with a private banker, he, too, is known to carry on his business by clerks and agents. The contract itself is to perform certain duties necessary for the collection of the paper and the security of the holder. But neither legal construction nor the common understanding of men of business can regard this contract (unless there be some express understanding to that effect) as an appointment of the bank as an attorney or personal representative of the owner of the paper authorized to select other agents for the purpose of collecting the notes, and nothing more. There is a wide difference made as well by positive law as by reason of the thing itself between a contract and undertaking to do a thing, and the delegation of an agent or attorney to procure the doing the same thing,—between a contract for building a house, for example, and the appointment of an overseer or superintendent authorized and undertaking to act for the principal in having a house built. The contractor is bound to answer for any negligence or default in the performance of his contract, although such negligence or default be not his own, but that of some subcontractor or under-workman. Not so the mere representative agent who discharges his whole duty if he acts with good faith and ordinary diligence in the selection of his materials, the forming his contracts, and the choice of his workmen. Now, in the case of the deposit for collection of a domestic note or bill payable in the same town, no one can imagine that this, instead of being a contract with the bank to use the proper means for collecting the paper, is a mere delegation of power to act as an attorney for that purpose. If this were so, and it should happen that by the fraud, the carelessness, or the ignorance of a clerk or teller the only responsible parties were discharged, or the note itself lost or destroyed, it would be a sufficient defense for the bank if it could show that the directors had employed ordinary care and caution in selecting their officers, or any similar defense which would be good in the mouth of an attorney in fact, or a steward acting in good faith for his principal, who has been defrauded in any transaction. If such were the understanding of this business, and the merchant had to look to the responsibility of the teller or clerk through whose hands his paper may pass, and not to that of the bank who employs them, few deposits for collection would be made, and it would soon be found expedient to deal only with banks or bankers who would guarantee their

officers. But the natural understanding of men of business is surely not this; it is of an implied agreement with the bank itself, of whose officers and agents they have no knowledge, and with whom they have no privity of contract."

And in *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459, it is laid down with great clearness and emphasis that "when a bank receives from the owner a bill for collection, payable either at the place where such bank carries on its business or at some distant place, it thereby becomes the agent of the owner for the collection, and in the discharge of its obligations as such, if the bill has not been accepted, it is bound to present the same for acceptance without unreasonable delay, as well as to present the same for payment when it becomes payable; and if not accepted when presented for that purpose, or not paid when presented for payment, it must take such steps by protest and notice as are necessary to charge the drawer and indorser, or it will be liable to its principal, the owner, for the damages which the latter sustains by any neglect to perform such duties, unless there be some agreement to the contrary expressed or implied." And in *Commercial Bank v. Union Bank*, 11 N. Y. 203, this is declared to be the established law, and no longer an open question. The same doctrine is held in *Thompson v. Bank of the State*, 3 Hill, 77 [30 Am. Dec. 354]; *Reeves v. State Bank*, 8 Ohio St. 465; *American Ex. Co. v. Haire*, 21 Ind. 4; *Bank of Montgomery v. Knox & Co.*, 1 Ala. 148; *Bank of Mobile v. Huggins*, 3 Id. 207; and to the same effect, *Taber v. Perrot*, 2 Gall. 565, per Story, J. And this is the settled law in England: *Van Wart v. Woolley*, 3 Barn. & C. 439; S. C., 10 Eng. Com. L. 204; *Mackersy v. Ramsays*, 9 Clark & F. 818.

If the subject of the controversy were a foreign bill of exchange, it might present an entirely different aspect; but it is a negotiable promissory note. A mere private person could have made the demand and given the notice, and the employment of a notary was not necessary. Our statute authorizes and permits a notary to act, but does not require his official action to the exclusion of any other individual.

The defendant, having appointed the notary by the year, and required a bond for the faithful performance of his duties, made him its agent and an officer of the bank. Upon recognized and general principles, the principal is "held liable to third persons in a civil suit for frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasance

or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or participate in, or indeed know of, such misconduct, or even if he forbade the acts or disapproved of them": Story on Agency, sec. 452.

The notary in this instance was not acting in the character of an independent officer in the discharge or execution of a duty devolved upon him by law, but as the agent of the defendant.

The judgment is reversed, and the cause remanded.

The other judges concurred.

AS TO FIRST POINT IN SYLLABUS, *supra*, see note to *Griswold v. Haven*, 82 Am. Dec. 395; *New Orleans etc. R. R. Co. v. Albritton*, 75 Id. 98; *Henderson v. San Antonio etc. R. R. Co.*, 67 Id. 675, note 685; *Moir v. Hopkins*, 63 Id. 312; *Johnson v. Barber*, 50 Id. 416, note 419; *Barber v. Hall*, 60 Id. 301, note 303; *Locke v. Stearns*, 35 Id. 382.

LIABILITY OF BANKS FOR NEGLIGENCE OF NOTARIES, ETC.: See note to *American Express Co. v. Haire*, 83 Am. Dec. 339, citing the principal case; *Citizens' Bank etc. v. Howell*, 63 Id. 714, and collected cases in note thereto 717; extended note to *Allen v. Merchants' Bank*, 34 Id. 313-316, where the subject is discussed.

THE PRINCIPAL CASE WAS SUMMARIZED, QUOTED FROM, AND APPROVED in *Daly v. Butchers' etc. Bank etc.*, 56 Mo. 102.

RUCKER v. ROBINSON.

[88 MISSOURI, 154.]

EQUITY RECOGNIZES RIGHT OF SURETY TO PAY OFF NOTE OR OBLIGATION OF PRINCIPAL DEBTOR, and be subrogated to the rights of the creditor.

SURETY IS NOT DISCHARGED UNLESS CREDITOR DOES SOME ACT BY WHICH HE DEPRIVES HIMSELF of the right of proceeding at law in the collection of the obligation. Without such act, an extension of time or giving indulgence will not release or exonerate the surety.

SURETY IS DISCHARGED WHERE CREDITOR MAKES AGREEMENT WHICH ESTOPS HIM from pursuing his remedy against the debtor.

COVENANT NOT TO SUE UPON CLAIM CANNOT BE PLEADED TO, AND PRESENTS NO BAR TO, ACTION ON SUCH CLAIM. The only remedy of the covenantee in such a case is a suit for damages on the covenant or agreement.

SURETY IS NOT DISCHARGED BY EXPRESS COVENANT NOT TO SUE PRINCIPAL DEBTOR FOR CERTAIN OR PRESCRIBED TIME, because, notwithstanding the agreement, suit may be commenced at any time.

SURETY IS NOT DISCHARGED, where, for a valuable consideration, the holder of a note gives an extended time for payment to the principal debtor, but reserves to himself the right to sue whenever required by the surety.

The facts are stated in the opinion.

Cline and Jamieson, and W. A. Alexander, for the defendants in error.

Napton and E. A. Lewis, for the plaintiffs in error.

By Court, WAGNER, J. This was a suit instituted in the St. Charles circuit court (and taken by change of venue to the circuit court of St. Louis County) by plaintiffs against the defendants, Robinson, McDonald, Griffith, and Overall, on a promissory note for the sum of four thousand dollars. The note was originally given to George Myers, as payee and holder, and bequeathed by him in his last will to his daughter Sarah A., a minor, who afterwards intermarried with John M. Rucker, the plaintiff. Robinson made no answer, and judgment by default was taken against him. McDonald, Griffith, and Overall filed their answer, alleging that they were securities on the note for Robinson, and that Myers in his lifetime, and Blanks, his executor, who was also guardian of Sarah A. Myers, and plaintiffs, when they severally had charge and possession of the note, for valuable considerations, by contract and agreement with Robinson, without their consent, indulged and gave time to Robinson from year to year, until he (Robinson) became insolvent, whereby they claimed that they were discharged.

From the evidence, it appears that when the note became due Myers, the obligee, was dead, and it had passed into the hands of Blanks, executor of Myers, who held it two or three years in the capacity of executor, and for about the same length of time as guardian of Sarah A. Myers, and upon her intermarriage with Rucker he delivered the note over to plaintiffs. The note was made payable with six per cent interest, and when it matured, Blanks, the executor, informed Robinson that as he was not needing the money, he might retain it, provided he would pay him four per cent additional interest, making the interest amount to ten per cent instead of six. Robinson paid the interest to the executor and guardian as long as he had possession of the note, and likewise paid one year's interest at the same rate to the plaintiffs after the note had come to their hands. The interest was generally paid at the end of the year on which it fell due, and in one year a note was taken for its payment. The executor, when he made the arrangement with Robinson for giving him indulgence and an extension of time in consequence of the additional interest being paid, stated that he would not sue upon the note unless compelled to do so by the securities; but he expressly reserved

the right to sue at any time whenever requested to do so by the sureties. Upon this evidence, the jury, under instructions from the court, found a verdict for the defendant.

It is not pretended here that the securities are discharged by means of the statutory provisions in relation to securities, as no notice was ever given by them to the holder or holders of the note to sue. The defense rests purely on legal and equitable principles. It is the doctrine of equity that the security has the right to pay off the note or obligation of the principal debtor, and be subrogated to the rights of the creditor; and if the creditor has made an agreement which estops him from pursuing his remedy against the debtor, the security is discharged. But the giving of time or indulgence will not have the effect of releasing the security without the creditor has by some contract obligatory tied up his hands, and prevented himself from the privilege of prosecuting his right of action. The agreement must not only be upon a sufficient consideration, but it must amount in law to an estoppel on the creditor sufficient to prevent him from bringing an action before the expiration of the extended time: *Nichols v. Douglass*, 8 Mo. 49; *Ford v. Beard*, 31 Id. 459; *Bailey v. Adams*, 10 N. H. 162; *Joslyn v. Smith*, 13 Vt. 353; *Farmers' Bank v. Reynolds*, 13 Ohio, 84; *Leavitt v. Savage*, 16 Me. 72. The agreement extending the time must not only be valid and binding in law, but the time of the extension must be precisely and definitely fixed: *Müller v. Stem*, 2 Pa. St. 286. Where, therefore, the creditor, in extending the time or granting indulgence to the debtor, reserves the right to bring suit at any time, the sureties are not discharged, because they can compel him on notice to proceed to the collection of the debt whenever they see fit. By the very terms of the agreement in this case, the creditor is not estopped; his hands are not tied. In *Nichols v. Norris*, 3 Barn. & Adol. 41, the creditor signed a deed of composition, and thereby agreed to extend the time of payment, and receive payment in installments. But as he had expressly reserved his right to proceed at any time against the surety, the surety was held not to be discharged. In *Melville v. Glendenning*, 7 Taunt. 126, the plaintiff received bills of exchange from defendant under an agreement that he should not be precluded from prosecuting while the bills were running. It was held that the surety was not thereby discharged. And this seems to be the prevailing doctrine: *Oxford Bank v. Lewis*, 8 Pick. 458; *Blackstone Bank v. Hill*, 10 Id. 132; *Wyke v. Rogers*, 1 De Gex,

M. & G. 408; *Wagman v. Hoag*, 14 Barb. 232; *Hubbell v. Carpenter*, 5 N. Y. 171; *Viele v. Hoag*, 24 Vt. 46. Now, it is well settled that a covenant not to sue upon a claim cannot be pleaded to and presents no bar to an action on the claim, the only remedy of the covenantee being a suit for damages on the covenant or agreement: *Atwood v. Lewis*, 6 Mo. 392; *Bircher v. Payne*, 7 Id. 462; *Bridge v. Tierman*, 36 Id. 439. Hence it has been held that an express covenant not to sue the principal debtor for a certain or prescribed time will not discharge the surety, because, notwithstanding the agreement, suit may be commenced at any time, and the covenant is no bar, but only gives the covenantee an action for damages: *Perkins v. Gilman*, 8 Pick. 229; *Fullam v. Valentine*, 11 Id. 156. There is nothing in the facts of this case to show that the plaintiffs, or those from whom they received the note, divested themselves of the power to sue at any time. As we have already shown, extension of time or giving indulgence will not release or exonerate the sureties, unless accompanied with some act on the part of the creditor whereby he deprives himself of the right of proceeding at law in the collection of the obligation. There was nothing here to prohibit the bringing an action to coerce payment, or to prevent the sureties from paying the debt, and enforcing their right against the principal.

The judgment is reversed and the cause remanded.

HOLMES, J., concurred.

LOVELACE, J., absent.

SURETY MAY BE SUBROGATED TO RIGHTS OF CREDITOR: *Jones v. Tincher*, 77 Am. Dec. 92, note 95; *Mitchell v. De Witt*, 78 Id. 561; *Eddy v. Traver*, 31 Id. 261, collected cases in note thereto 264; *James v. Jacques*, 32 Id. 613; *Rodes v. Crockett*, 24 Id. 439; *Fleming v. Beaver*, 19 Id. 629; *Hayes v. Ward*, 8 Id. 554.

FORBEARANCE, DELAY, NEGLIGENCE, OR INDULGENCE OF CREDITOR WILL NOT DISCHARGE SURETY if not founded on a valuable consideration: *Carter v. Jones*, 49 Am. Dec. 425, note 428; *Dane v. Corduan*, 85 Id. 53, note 58; *Newell v. Hamer*, 35 Id. 415; *Driskell v. Mateer*, 80 Id. 105; note to *Steele v. Boyd*, 29 Id. 225; *Hellen v. Cranford*, 84 Id. 421; *McGee v. Metcalf*, 51 Id. 122; *Cook v. Southwick*, 60 Id. 181; *Marberger v. Pott*, 55 Id. 479; *Martin v. Pope*, 41 Id. 66; *Brinagar v. Phillips*, 36 Id. 575; note to *Bangs v. Strong*, 42 Id. 67.

SURETY MAY BE DISCHARGED BY CREDITOR'S ACTS: *Driskell v. Mateer*, 80 Am. Dec. 105, note 107; *Carpenter v. King*, 43 Id. 405, note 408; extended note to *Steele v. Boyd*, 29 Id. 225, 226; *Young v. Cleveland*, 82 Id. 185, note 157; *Strasbridge v. Baltimore etc. R. R. Co.*, 74 Id. 541; *Hampstead v. Watkins*, 42 Id. 696; note to *Fellows v. Prentiss*, 45 Id. 493; note to *Hampstead v. Watkins*, 42 Id. 714; *King v. Baldwin*, 8 Id. 415.

SURETY IS DISCHARGED BY VALID AGREEMENT FOR DELAY, WHEN: *King v. State Bank*, 47 Am. Dec. 739, note 743; *Yates v. Donaldson*, 61 Id. 283, note 294, containing collected cases; *Dickerson v. Board of Commissioners etc.*, 63 Id. 373, note 380; note to *Driskell v. Mater*, 80 Id. 107; note to *Fellows v. Prentiss*, 45 Id. 493.

THE PRINCIPAL CASE WAS CITED IN EACH OF THE FOLLOWING AUTHORITIES, AND TO THE POINT STATED: The fourth and fifth points in the *syllabus, supra*, were referred to with approval in *Hosea v. Rowsley*, 57 Mo. 358. The second and third points of the same were approved in *Headlee v. Jones*, 43 Id. 237, where it was held that an agreement to grant an extension, to avail the surety, must not only be founded upon a sufficient consideration, but it must operate as an estoppel on the creditor sufficient to prevent him from bringing an action before the expiration of the extended time. The fourth point in the *syllabus, supra*, was approvingly referred to in *Stillwell v. Aaron*, 69 Id. 544, where it was held, however, that an agreement between the creditor and the principal debtor to extend the time for payment of the debt for a definite period, if founded upon a sufficient consideration, and made without the surety's consent, will discharge the surety; and that payment of interest in advance is a sufficient consideration, even if it be at a usurious rate. A distinction was drawn in this case between the effect of a covenant not to sue, and an agreement to change the terms of the contract as to payment, performance, or otherwise. The principal case was considered analogous in principle to *Paine v. Voorhees*, 26 Wis. 533, where it was held that the taking of a debtor's promissory note, either for a precedent liability or for one incurred at the time, is no payment, unless expressly so agreed; but that where the creditor holds a bond as security for such indebtedness, the taking of the debtor's note does not of itself necessarily suspend his right of action on the bond, or discharge the surety thereon.

BARNARD v. DUNCAN.

[88 MISSOURI, 178.]

TRUSTEE UNDER DEED GIVING HIM POWER TO SELL AND CONVEY CAN SELL AND CONVEY SUCH TITLE ONLY as is vested in him by his conveyance. Such an agent has no authority to bind his principal or grantor by a covenant in his name.

TRUSTEE'S CONVEYANCE UNDER POWER TO SELL AND CONVEY IS VALID WITHOUT WARRANTY OR PERSONAL COVENANTS. In fact, there can be no warranty of title on such sales, and all purchasers are bound to know it.

AUTHORITY TO CONVEY MERELY GIVES NO IMPLIED POWER TO MAKE COVENANTS.

TRUSTEE CANNOT BE REQUIRED TO ENTER INTO ANY PERSONAL COVENANTS FOR TITLE, or against encumbrances generally, where he has sold real estate under a deed of trust. He sells in his fiduciary capacity only, and acts as a mere agent to sell and convey, and as a trustee to execute the trust declared.

USUAL TRUSTEE COVENANT AGAINST ACTS AND ENCUMBRANCES DONE OR SUFFERED BY HIMSELF is the only one which can be required of a trustee executing a mere naked power of sale under a deed of trust.

PURCHASER MUST TAKE NOTICE OF TITLE AND ITS DEFECTS AS IT APPEARS OF RECORD, where he buys at a sale made by a mortgagee or trustee under a power to sell for the payment of debts. He cannot legally demand covenants for title contained in the conveyance to the trustee.

VENDOR IS EXEMPTED FROM PERSONAL RESPONSIBILITY, WHEN. — Trustee having power under deed to sell and convey real estate, as well as executors, administrators, guardians, mortgagees, assignees for the benefit of creditors, and other like trustees, who have no other interest in the property than a legal title with power to sell and convey, are exempted from responsibility in making sales, except where fraud exists, or where they voluntarily enter into personal covenants of warranty.

WAIVER OF DEMAND FOR TRUSTEE'S COVENANT, AND OF OBJECTIONS TO TRUSTEE'S DEED. — **VENDEE MAY LAWFULLY DEMAND ORDINARY TRUSTEE COVENANT OF TRUSTEE** who sells to him under power of sale, as the trustee cannot object to covenanting against acts or encumbrances done or suffered by himself; but if the vendee absolutely refuses to complete his purchase unless a deed with full general warranty of title is tendered, it amounts to a waiver of any demand for a covenant against the trustee's own acts merely, and of all objections to the deed that was tendered because of its not containing such a covenant.

WHERE PURCHASER BUYS REAL ESTATE, AND TAKES DEED WITHOUT COVENANT OF WARRANTY, HE TAKES RISK OF TITLE ON HIMSELF. He must examine the records and title for himself, and so far the rule of *caveat emptor* may be said to apply to him. But misrepresentations or suppression of material facts are matters collateral to the written contract or deed, and may be inquired into on the ground of fraud.

VENDOR MUST DISCLOSE ALL MATERIAL FACTS OF WHICH HE KNOWS VENDEE TO BE IGNORANT.

THERE MAY BE FRAUD IN SUPPRESSING AND CONCEALING MATERIAL FACTS, as well as in direct misrepresentation, if the other party is knowingly suffered to deal under a delusion.

VENDOR MUST DISCLOSE DEFECTS, WHEN. — **AT SALE BY TRUSTEE UNDER POWER**, where the facts or means of information concerning the condition and value of the thing sold are equally accessible to both parties, and nothing is said or done which tends to impose on the other, or to mislead him, there is no fraud of which the law can take notice; but where material facts are accessible to the vendor only, and he knows them not to be within the diligent attention, observation, and judgment of the other party, he is bound to disclose those facts, and make them known to the purchaser.

NEW NOTICE IS REQUIRED FOR NEW SALE. Where the trustee in a deed of trust with a power of sale gives notice for a certain number of days, advertises the property, and puts it up for sale at public auction, and the property is struck off to a bidder, the trustee cannot upon the same day resell the property because the purchaser refuses to complete his contract; there must be a new publication of notice.

MEASURE OF DAMAGES WHERE PURCHASER AT TRUSTEE'S AUCTION SALE REFUSES TO PERFORM HIS CONTRACT, and the property is resold on the same day within the hours mentioned in the advertisement, but at an enormous sacrifice, in consequence of most of the bidders having departed, is not the difference in price between the two sales, though it would be the proper criterion of damages actually sustained if the latter sale had been fairly made on proper notice; but even that would not be conclusive. *AM. DEC. VOL. XC—27*

sive. The common-law rule is to give no more damages than the actual loss sustained; and where the property is shown to be still worth as much as was bid for it, the damages can be little more than nominal.

PLAINTIFF sued to recover the amount bid by defendant at a sale made by plaintiff as trustee of lands conveyed to him as trustee. The facts are stated in the opinion, and the questions which arose under the instructions of the court also appear there. The court gave the instructions asked by the defendant, but refused those asked by plaintiff, and the plaintiff took a nonsuit, with leave to move to set the same aside.

C. F. Burnes and Holliday, for the plaintiff in error.

Whittlesey and G. S. and J. Van Waggoner, for the defendant in error.

By Court, HOLMES, J. This was a suit by a trustee vendor against his vendee at a sale at public auction of real estate under a deed of trust made to secure the payment of the debts of numerous creditors, grounded on an alleged breach of contract by the purchaser in refusing to pay the amount of his bid and accept the deed that was tendered to him, conveying all the right, title, and interest in the property that was vested in the trustee, but containing no covenants of warranty whatever; and the action sounded in damages. Upon the refusal, there was a resale of the property a few hours afterwards on the same day, without a readvertising or any new notice given, resulting in a difference in the price amounting to some \$2,225, which the plaintiff seeks to recover by way of damages.

The answer of the defendant denied the material allegations of the petition. The defense rests mainly upon the grounds that the deed tendered to him did not contain a full warranty of the title, and that the property was encumbered to a much larger amount than he was aware of; that misstatements of fact, or erroneous information, was given to him by the auctioneer with regard to the encumbrances just before the sale took place, by which he was led into mistake as to their amount; that the sale was fraudulently made, and that he is not liable for damages.

The conveyance that was made to the trustees was in the form of an ordinary deed of trust in the nature of a mortgage to secure the payment of debts, and was in this instance more like an assignment for the benefit of creditors than a simple mortgage for the security of a particular demand, the bene-

ficiaries being numerous; and it contained the usual power to sell and convey the property and apply the proceeds of the sales to the satisfaction of the debts named, according to the trusts declared in the instrument. It contained covenants of warranty of title and against encumbrances. The defendant insists here that he was entitled to demand a deed from the trustee containing the same or similar covenants. Whether he expected the original grantors or the beneficiaries to join in the deed with the trustee and make those covenants, or that the trustee should make them as his own personal covenants, does not very clearly appear. But in either case there is no warrant in law for such a demand. The sale is not made by the original owners. It was a sale by the trustee in his fiduciary capacity only. The trustee undertakes only for the execution of the power that is given him, and he is only authorized to sell and convey the title which is vested in him by the deed. He was not empowered to make a deed in the name of the grantors to him, nor to execute any covenants in their names. Nor can he be required to enter into any personal covenants for title or against encumbrances in general. The only covenant that can be demanded of a mere naked trustee, who has no interest in the property beyond the bare legal title, in any case of this kind, is the usual trustee covenant against acts or encumbrances done or suffered by himself: Rawle on Covenants for Title, 566. This covenant was not demanded. The deed tendered was refused, as it seems, absolutely, for the reason that it did not contain full covenants of general warranty. The written note sent by the purchaser to the trustee demanded a deed that was good. Precisely what this might mean unexplained we need not stop to inquire, inasmuch as the defendant rests his case here upon the broad ground that he had a right to demand a general warranty.

It seems to have been the practice of the courts of chancery in England, in cases of sales by trustees or under orders of court, to require the *cestuis que trust*, who were to receive the proceeds of the sales, to join with the trustees and enter into covenants of warranty of the title. But even this doctrine appears to be of questionable authority in these later times in a case of this kind; nor does it appear to have been recognized in this country. Such a principle would have to be extended to all trustees for the payment of debts, assignees of insolvents, executors, administrators, guardians; and the execution of numberless trusts would be thereby rendered im-

practicable or wholly impossible: *Duchess of Rutland v. Wake-man*, 8 Brown Parl. C. 159. Lord St. Leonard thought it might still be applied in some cases of two or more *cestuis que trust*; but admitted that where trustees sell for the payment of debts the purchaser is not entitled to any covenants for the title, because no line can well be drawn as to the *quantum* for which the several beneficiaries should be required to covenant. The principle relates to parties who are presumptively interested as beneficiaries. Mr. Rawle concludes that the correct test of the application of such a rule would be the extent of the purchaser's liability to see to the application of the purchase-money: *Rawle on Covenants for Title*, 3d ed., 568, note 2. The matter would seem to depend upon the jurisdiction of a court of equity in a proper case, as when one of the parties should come into court to enforce a specific performance against the other. And further, inasmuch as the statute expressly exempts the purchasers in these cases from any responsibility for the application of the purchase-money by the trustees, the rule as limited can have no application here: *Rev. Code 1855*, p. 1556, sec 9. This is simply an action at law for damages on breach of contract.

The defendant claims that he is entitled to the benefit of the covenants contained in the conveyance to the trustee. He can derive no advantage from these otherwise than as assignee of the trustee. If he had accepted the deed of the trustee, he would have become the owner of the estate for the time being, and as such would have had all the protection which those covenants could have afforded him without any covenant of warranty from the trustee. Even a sheriff's deed has been held to be effectual for this purpose: *Dickson v. Desire*, 23 Mo. 151; *Rawle on Covenants for Title*, 352, 360.

The case belongs to the class of fiduciary vendors, as executors, administrators, guardians, mortgagees, assignees for the benefit of creditors, and other like trustees, who have no other interest in the property than a legal title with power to sell and convey, and who are not bound to give any other covenant than the ordinary trustee covenant against their own acts: *Rawle on Covenants for Title*, 3d ed., 566. They cannot be compelled to enter into any other covenant. They are mere agents to sell and convey, and trustees to execute the trusts declared. They have power to sell and convey such title as is vested in them, and to make such deed as will be effectual to convey that title, and no more, unless expressly empowered

and authorized by the conveyance made to them to enter into other covenants in the name of their grantors. Such agents have no authority to bind their principals or grantors by covenants in their names. Their conveyances are good and effectual without either warranty or personal covenants, and an authority to convey merely gives no implied power to make covenants: *Nixon v. Hyserott*, 5 Johns. 57; *Van Eps v. Schenectady*, 12 Id. 435 [7 Am. Dec. 380]. The exemption of this class of vendors from personal responsibility, except where fraud exists, or they voluntarily enter into personal covenants of warranty, would seem to be indispensable; for otherwise no one would be found willing to accept such offices and trusts: *Worthy v. Johnson*, 8 Ga. 241 [52 Am. Dec. 399]; *Aven v. Beckom*, 11 Id. 1. Such trustees sell only by virtue of the powers given them. They do not undertake to convey anything more than the right, title, and estate that is vested in them. All purchasers are bound to know that there can be no warranty of the title on such sales, and it is presumed it is always so understood. The title is on record; the records are open to all, and the purchasers can examine the title for themselves. There being no warranty, the rule of *carcat emptor* must necessarily be applied in reference to the conveyance, except as to the ordinary trustee covenant which the vendor may require. We see no good reason why this covenant should not be required of this trustee. He could not well object to covenanting against acts or encumbrances done or suffered by himself. And if the purchaser had objected to the deed on this ground, there would have been no cause of action against him here. He absolutely refused to complete his purchase unless a deed with full general warranty of title were tendered. We think this amounted to a waiver of any demand for a covenant against the trustee's own acts merely, and of all objection to the deed that was tendered on that ground alone.

It appears that the records do not furnish any true criterion of the exact amount of the encumbrances which still remained unpaid on this property. This information could scarcely be obtained otherwise than from the trustee himself. No application was made to him for information on this head. He made no statements or representations on the subject. But the defendant just before the sale inquired of the auctioneer about the amount of the encumbrances. He answered that he did not know, but had heard that they amounted

to a given sum named. Such statements could furnish no ground on which any man of prudence and judgment would venture to rely. They do not appear to have been such as could have materially influenced his judgment. We do not think they were such misstatements or misrepresentations as could be considered to have been fraudulently made, even if the information given had turned out not to be entirely true and correct. Statements which are mere matter of opinion on hearsay information cannot be supposed to influence the judgment of the purchaser: 1 Story's Eq. Jur., sec. 197. But the other evidence, so far from showing the information given to have been inaccurate or false, tended rather to establish its entire correctness. There was nothing in this circumstance, taken by itself alone, on which to ground a charge of fraud.

Within a few hours after the sale had taken place, a deed was tendered to the defendant, purporting to convey all the title that was vested in the trustee, and which he had power to sell, but containing no covenants of warranty, and payment of the amount of the bid was demanded. Upon the refusal to accept it, the trustee proceeded at once to put up the property for sale again at the same place on the same day, without readvertising or any new notice, and few persons being present, the property was resold for twenty-five dollars. This proceeding can neither be justified nor sustained. It was in practical effect a sale without notice. The sale as advertised had taken place several hours before, and all bidders had departed. Though yet within the hours mentioned in the advertisement, it cannot be considered a fair and valid sale pursuant to notice. There should have been a new publication of notice for another day. This was done in the case of *Gardner v. Armstrong*, 31 Mo. 538. Under these circumstances, the difference of price between the two sales was no proper measure of the damages. In *Gardner v. Armstrong*, *supra*, it was held that the difference of price between the two sales fairly made on due notice might be taken as a criterion of the damages actually sustained, though not as conclusive. We see no reason for departing from this decision; but it is still to be borne in mind that the common-law rule is, to give no more damages than the actual loss sustained. Where the property is shown to be still worth as much as was bid for it, the damages can be little more than nominal: *Sedgwick on Damages*, 100-102. For these reasons, we think the first in-

struction that was given for the defendant was entirely erroneous.

The second instruction given for the defendant might properly have been given if there had been a sufficient basis for it in the evidence; it refers exclusively to the statement made by the auctioneer in answer to the defendant's inquiries. As an instruction upon the matter of fraud in making the sale, it placed the subject on too narrow ground. The trustee was himself there present as the person making the sale. It appears that there were other deeds of trust, and other property, real and personal, conveyed by this deed for the payment of these same debts, and that the amount of the encumbrance actually existing upon the land offered for sale would be greatly affected by the application of the proceeds of other property sold; and by the amount to be realized from other property not yet sold, in reduction of the encumbrance on this land. This was a matter of fact which for the most part could be known only to the trustee, and of which he alone was in a situation to judge with any certainty. These facts could not be ascertained by any examination of the records of the recorder's office, and were not equally open to both vendor and vendee. Where the facts or means of information concerning the condition and value of the thing sold are equally accessible to both parties, and nothing is said or done which tends to impose on the other, or to mislead him, there is no fraud which the law can notice; but where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation, and judgment of the other party, he is bound to disclose such facts, and to make them known to the purchaser. It is only where such attention on the part of the vendee might enable him to ascertain the facts and protect himself against surprise, mistake, or imposition that the maxim *caveat emptor* in this matter of fraud ought to be applied to him. The vendor must disclose all material facts of which he knows the vendee to be ignorant. There may be fraud in suppressing and concealing material facts and circumstances, as well as in direct misrepresentation, if the other party is knowingly suffered to deal under a delusion: 2 Kent's Com. 482-485. These were proper matters to be submitted to the jury on the question of fraud on the part of the trustee in making the sale; and evidence tending to show that disclosures of such material circumstances were made by the trustee privately to one bidder, who was thereby

deterred from bidding further, and which were not publicly stated to all present, would certainly be admissible and competent by way of showing an actual and fraudulent suppression of the truth.

The first instruction refused the plaintiff should have been given. The third, fifth, sixth, and seventh might very well have been given also. As to the second and fourth, they must be held to have been rightly enough refused as making an incorrect and improper application of the maxim *caveat emptor*. In reference to the title, it is more accurately a question of warranty or no warranty than of *caveat emptor*, though if the purchaser buys without warranty he takes the responsibility of the title being good, and so far may be said to buy at his peril.

In reference to examining records, it is the same; of course, the party may examine the records or not, at his own peril. But the more special and peculiar application of this maxim belongs to the contract of sale of goods, and the question of fraud or of implied warranty; but in respect of conveyances of real estate, as laid down by Lord Coke, the common law binds not the vendor, "unless there be a warranty either in deed or in law, for *caveat emptor, qui ignorare non debuit quod jus alienum emit*,—let the purchaser exercise proper caution, for he ought not to be ignorant of the amount and nature of that person's interest which he is about to purchase": Broom's Legal Maxims, 354. In other words, if the purchaser buys real estate, and takes a deed without covenant of warranty, he takes the risk of the title on himself; he must examine the title for himself, and so far the rule of *caveat emptor* may be said to apply to him. But misrepresentations or suppression of material facts are matters collateral to the written contract or deed, and may be inquired into on the ground of fraud: *Id.* 361.

We think there should be a new trial upon instructions better adapted to the nature of the case.

Judgment reversed and the cause remanded.

WAGNER, J., concurred.

LOVELACE, J., absent.

RULE OF CAVEAT EMPTOR APPLIES IN SALE BY TRUSTEE UNDER POWER: See note to *Cassell v. Ross*, 85 Am. Dec. 277; *Sears v. Livermore*, 85 Id. 564; *Sutton v. Sutton*, 56 Id. 109; *Farmers' etc. Bank v. Martin*, 61 Id. 353; *Lighty v. Shorb*, 24 Id. 334; note to *Snyder v. Laframboise*, 12 Id. 191. *Caveat emptor* is the rule between the vendor and vendee of realty: *Collier v. Harb-*

ness, 71 Id. 216, note 218; *Cullum v. Branch Bank*, 37 Id. 725; and is also the rule between the buyer and seller of personalty: Note to *Moses v. Mead*, 43 Id. 680; *Kingsbury v. Taylor*, 50 Id. 607; *Hyatt v. Boyle*, 25 Id. 276. But the rule of *caveat emptor* does not cover fraudulent concealment or misrepresentation by the vendor of any material fact inducing the purchaser to buy: *Wints v. Morrison*, 67 Id. 658; *Pringle v. Samuel*, 13 Id. 214; note to *Emerson v. Brigham*, 6 Id. 117; *Hanks v. McKee*, 13 Id. 267; *Hughes v. Robertson*, 15 Id. 108; *George v. Johnson*, 44 Id. 288, note 289; *Munroe v. Pritchett*, 50 Id. 203; *Bryant's Ex'r v. Boothe*, 68 Id. 117; *Rockafellow v. Baker*, 80 Id. 624; *Hanks v. McKee*, 13 Id. 265; *Mitchell v. Zimmerman*, 51 Id. 717; *Yost v. Shaffer*, 56 Id. 509; *Carson v. Baillie*, 57 Id. 659; *Alvarez v. Brannan*, 68 Id. 274; *Brown v. Manning*, 74 Id. 736; *Rimer v. Dugan*, 77 Id. 687; *Hadley v. Clinton Co. Imp. Co.*, 82 Id. 454.

THERE MAY BE FRAUD IN SUPPRESSING AND CONCEALING MATERIAL FACTS, as well as in direct misrepresentation, if the other party is knowingly suffered to deal under a delusion: See note to *Emerson v. Brigham*, 6 Am. Dec. 117; *Cook v. Grant*, 16 Id. 564; *Parham v. Randolph*, 35 Id. 403; *Cullum v. Branch Bank*, 37 Id. 725; *Ingram v. Morgan*, 40 Id. 626; *Tyson v. Passmore*, 44 Id. 181; *George v. Johnson*, 44 Id. 288, note 289; *Munroe v. Pritchett*, 50 Id. 203; *Griffin v. Chubb*, 58 Id. 85; *Bryant v. Crosby*, 58 Id. 767; *Wints v. Morrison*, 67 Id. 658; *Bryant's Ex'r v. Boothe*, 68 Id. 117; *Page v. Parker*, 80 Id. 172; *Rockafellow v. Baker*, 80 Id. 624; *Foster v. Kennedy's Adm'r*, 81 Id. 56; *Hanks v. McKee*, 13 Id. 265; *West v. Anderson*, 21 Id. 737; note to *Loddell v. Baker*, 35 Id. 363; note to *Anderson v. Burnett*, 35 Id. 427; *Samderson v. Hatterman*, 37 Id. 404, note 405; *Mitchell v. Zimmerman*, 51 Id. 717; *Yost v. Shaffer*, 56 Id. 509; *Campbell v. Hillman*, 61 Id. 195; *Alvarez v. Brannan*, 68 Id. 274; *Rimer v. Dugan*, 77 Id. 687; *Harrie v. Mullins*, 79 Id. 320; *Page v. Parker*, 80 Id. 172.

VENDOR MUST DISCLOSE DEFECTS, WHEN: *George v. Johnson*, 44 Am. Dec. 288, note 289; *Brown v. Gray*, 72 Id. 563; *Hoe v. Sanborn*, 78 Id. 163; *Cecil v. Spurger*, 82 Id. 140; *Hadley v. Clinton Co. Imp. Co.*, 82 Id. 454.

CONVEYANCE BY TRUSTEE, EFFECT OF: See extended note to *Gale v. Men-
sing*, 64 Am. Dec. 199-203; *Roe v. Allen*, 43 Id. 336.

POWER OF OFFICER TO ADJOURN SALE, AND AS TO WHETHER NEW NOTICE IS NECESSARY: See extended note to *Russell v. Richards*, 26 Am. Dec. 536-540.

NOTICE OF DEFECT IN TITLE: See note to *Galland v. Jackman*, 85 Am. Dec. 177. As to notice of recitals in title papers and records, see extended note to *Lodge v. Simonton*, 23 Id. 48-52.

RULE OF DAMAGES ON RESALE AND OTHERWISE WHERE VENDEE HAS REFUSED TO COMPLETE HIS PURCHASE: *Girard v. Taggart*, 9 Am. Dec. 327; *Ashcom v. Smith*, 21 Id. 437; *McCombe v. McKennan*, 37 Id. 505; *West v. Cunningham*, 33 Id. 300; extended note to *Garrard v. Dollar*, 57 Id. 275; *Ashe v. De Rossett*, 72 Id. 552; *King v. Gilson*, 83 Id. 269.

EXECUTOR'S DEED CONTAINS NO WARRANTY, and only conveys the title of the deceased to the purchaser: *Halleck v. Guy*, 70 Am. Dec. 643.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: As titles are on record, and the records are open to all, purchasers must examine titles for themselves: *Schwickerath v. Cooksey*, 53 Mo. 80. Where the trustee in a deed of trust with a power of sale at public auction, upon giving notice for a certain number of days, advertises the prop-

erty and puts it up for sale, and the property is struck off to a bidder, the trustee cannot upon the same day resell the property because the purchaser refuses to complete the contract. There must be a new publication of notice: *Judge v. Booge*, 47 Mo. 549; *Dover v. Kennerly*, 38 Id. 475.

RULE OF CAVEAT EMPTOR FAILS OF APPLICATION, WHEN. — The subject-matter of this note runs into the law of fraud and of warranties, both express and implied. It is impracticable to include within the compass of this note a treatment of all the cases in which the seller has given an express warranty, and of all the cases in which the law implies a warranty from the surrounding circumstances of the sale. Such cases have been quite fully reported in this series, and this note will therefore deal principally with those cases in which the buyer can bring fraud home to the party from whom he purchases. "The tendency of all the modern cases on warranty," says Story, "is to enlarge the responsibility of the seller, to construe every affirmation by him to be a warranty, and frequently to imply a warranty on his part from acts and circumstances wherever they were relied upon by the buyer. The maxim of *caveat emptor* seems gradually to be restricted in its operation, and limited in its dominion, and beset with the circumvallations of the modern doctrine of implied warranty, until it can no longer claim the empire over the law of sales, and is but a shadow of itself. Gradually the old common-law rule of *caveat emptor* has been losing ground, and the law has been tending towards the doctrine of the Roman law, which is its antipode, — *caveat venditor*, — until it now occupies a middle ground between the two, by requiring the strictest good faith on the part of the seller in all that he says and does, and throwing on the buyer the responsibility for any foolish mistakes or wrong conclusions which may result from his trusting to his own judgment": Story on Sales, sec. 359, 365; *Wintz v. Morrison*, 67 Am. Dec. 653, 661; *Brantley v. Thomas*, 73 Id. 264. The difference between the doctrine of the civil law and that of the common law in respect to implied warranties is discussed in *Hoe v. Sanborn*, 78 Id. 163; *Wright v. Hart*, 18 Wend. 453; and extended note to *Scott v. Hix*, 62 Am. Dec. 460-468, on implied warranty of title on sale of chattel. It may be laid down as a general rule that wherever the seller has given an express warranty, or the law implies a warranty from the circumstances, or the buyer can bring fraud home to the party from whom he purchased, the doctrine of *caveat emptor* fails of application: Story on Sales, sec. 349; 2 Schouler's Personal Property, 329; *Whitaker v. Eastwick*, 75 Pa. St. 229; *Roberts v. Hughes*, 81 Ill. 130; *Rentor v. Maryott*, 21 N. J. Eq. 123; *Lindley v. Hunt*, 22 Fed. Rep. 52; *Strong v. Waddell*, 56 Ala. 471; *Osgood v. Lewis*, 18 Am. Dec. 317; *Hyatt v. Boyle*, 25 Id. 276; *Kingsbury v. Taylor*, 50 Id. 607; *Wintz v. Morrison*, 67 Id. 658; *Brown v. Gray*, 72 Id. 563, note 566, containing collected cases showing that *caveat emptor* is rule of sales in absence of fraud or warranty. The maxim *caveat emptor* will not be applied to protect a fraudulent grantor: *Pringle v. Samuel*, 13 Id. 214; *Wintz v. Morrison*, 67 Id. 663. Every misrepresentation by the vendor in respect to a fact affording a material inducement to the sale, which operates actually to deceive the vendee, is a fraud which vitiates the sale: *Keely v. Turbeville*, 11 Lea, 339; *Brown v. Tuttle*, 66 Barb. 169; *Tyson v. Passmore*, 44 Am. Dec. 181; *Munroe v. Pritchett*, 50 Id. 203; *Bryant v. Crosby*, 58 Id. 707; *Yost v. Shaffer*, 56 Id. 509; *Mitchell v. Zimmerman*, 51 Id. 717; *Griffin v. Chubb*, 58 Id. 85; *Alvares v. Brannan*, 68 Id. 274; *Foster v. Kennedy's Adm'r*, 81 Id. 56; *Page v. Parker*, 80 Id. 172; *Wintz v. Morrison*, 67 Id. 658; *Rimer v. Dugan*, 77 Id. 687; *Parham v. Randolph*, 35 Id. 408; *Loddell v. Baker*, 35 Id. 358; *West v. Anderson*, 21 Id. 787; *Hanks v. McKee*, 13 Id. 285, and note 267.

showing cases in which the maxim *caveat emptor* does not apply; note to *Emerson v. Brigham*, 6 Id. 118, and numerous cases there cited. Thus where the vendor makes misrepresentations in relation to the title of his land, though innocently and under a belief of their truth, and the vendee is thereby deceived to his prejudice, the latter is entitled, without previous eviction, to rescind: *Rimer v. Dugan*, 77 Id. 687; *Parham v. Randolph*, 35 Id. 403.

Any intentional misrepresentation or concealment in relation to land, either as to quality or title, by which the purchaser is imposed upon, is fraudulent; and though the state of a title appear from the records, a misrepresentation by the vendor with respect thereto will not be the less fraudulent: See case last cited. And when a misrepresentation is made by the vendor as to the quantity of land, though innocently, the right of the purchaser is to have what the vendor can convey, with an abatement out of the purchase-money for so much as the quantity falls short of the representation: *Mitchell v. Zimmerman*, 51 Am. Dec. 717. A vendor of land who knowingly misrepresents material facts will not be permitted to derive any benefit from the transaction; but the injured party has in such a case the right to elect to rescind the contract and recover the purchase-money, or to proceed upon the covenants in his deed: *Alvarez v. Brannan*, 68 Id. 274. A vendor who refers a purchaser to a third person for information in regard to the property to be sold is bound by the declarations of the person referred to in the same manner as if he had made them himself: *Chadsey v. Greene*, 24 Conn. 562. The cases in reference to fraudulent representations show a want of certainty and harmony: See note to *Emerson v. Brigham*, 6 Am. Dec. 118. Of course, representations are not fraudulent if their falsity was known to the party to whom they were made: *Anderson v. Burnett*, 35 Id. 425; and it has been held that false representations, to be a ground for action, must be material, and fraudulently, knowingly, and intentionally made, and must be accompanied by some deceit practiced for the purpose of putting the vendee off his guard: *Page v. Parker*, 80 Id. 172; *Bryant v. Crosby*, 58 Id. 767; but the better opinion seems to be that where the vendee in a contract for the sale of either real or personal property acts to his injury upon the vendor's representations in relation to a matter material to the contract, and upon which he has a right to rely and trust, the vendor is bound to make his representations good, whether he knew their falsity or not: *Rimer v. Dugan*, 77 Id. 687; *Poster v. Kennedy's Adm'r*, 81 Id. 56; *Mitchell v. Zimmerman*, 51 Id. 717; *Tyson v. Passmore*, 44 Id. 181; *Alvarez v. Brannan*, 68 Id. 274; *Loddell v. Baker*, 35 Id. 359; *Case v. Ayers*, 65 Ill. 142; *Harvard v. Irwin*, 18 Pick. 95; and the vendee need not prove that the vendor knew that the representation was false when made: *Brown v. Tuttle*, 66 Barb. 169; *Munroe v. Prichett*, 50 Am. Dec. 203. Especially does the rule of *caveat emptor* not apply where one party to the contract entered into it by reason of the false and fraudulent representations of another, who is supposed to possess superior means of information: *Mitchell v. Zimmerman*, 51 Id. 717; *Griffin v. Chubb*, 58 Id. 86; *Hadley v. Ginton Co. Imp. Co.*, 82 Id. 484; *Brantley v. Thomas*, 73 Id. 284; *Ellis v. Andrews*, 56 N. Y. 83, note. Thus the maxim *caveat emptor* does not apply to a sale of goods where the buyer has no opportunity of inspection: *Jones v. Just*, L. R. 3 Q. B. 197; as where goods are sold before their arrival or landing: See note to *Johnson v. Cope*, 5 Am. Dec. 424; *Hyatt v. Boyls*, 25 Id. 276; but the mere fact that the inspection would be inconvenient or difficult is not equivalent to its impracticability: See two cases last cited. If the vendee be not actually deceived by the vendor's representations, or if they relate to a trifling or immaterial fact, the contract will not be rendered voidable: *Taylor*

v. *Fleet*, 1 Barb. 471. So, too, the vendor's mere expression of judgment or opinion as to the value of the subject-matter, or an exaggerated estimate of its value, if made *bona fide*, in cases where no special confidence was placed in such opinions, will not be such a misrepresentation as to avoid the contract of sale: *Rockafellow v. Baker*, 80 Am. Dec. 624; *Foster v. Kennedy's Adm'r*, 81 Id. 56; *Page v. Parker*, 80 Id. 172; note to *Emerson v. Brigham*, 6 Id. 118; *Ellis v. Andrews*, 56 N. Y. 83; *Belcher v. Costello*, 122 Mass. 190, 191; *Morse v. Shana*, 124 Id. 59; *Davis v. Meeker*, 5 Johns. 355; *Stebbins v. Eddy*, 4 Mason, 414; *Jenkins v. Long*, 19 Ind. 28; the buyer must rely upon his own judgment for value: *Ellis v. Andrews*, 56 N. Y. 83; *Frank v. Tolman*, 75 Ill. 648. *Contra*, as to mining stocks: *Cifford v. Carvill*, 29 Cal. 589.

But if there be any relation of trust or confidence between the parties, or if the buyer be without other means of information, and be induced by the representations of the seller to forbear making inquiries, and be actually deceived, the contract will not be binding upon him. The only question in such cases is, whether the vendee were actually deceived to his injury by anything which the vendor either did or said in respect to the sale. If he were, the doctrine of *caveat emptor* does not apply: *Biggs v. Perkins*, 75 N. C. 397; *Armstrong v. Bufford*, 51 Ala. 410; *Ellis v. Andrews*, 56 N. Y. 83, note; *Story on Sales*, secs. 170, 181. Every concealment of defects, and every trick and artifice for the purpose of concealment, or of fraud or surprise, operates to vitiate the contract of sale: *McGavock v. Ward*, Cooke, 403; *Biggs v. Perkins*, 75 N. C. 397; *Roseman v. Canovan*, 43 Cal. 110; *Bevans v. Farrell*, 18 La. Ann. 232; *Mathews v. Bliss*, 22 Pick. 48; *Smith v. Countryman*, 30 N. Y. 655, 681; *Hanks v. McKee*, 13 Am. Dec. 265, note 267, showing cases in which the maxim *caveat emptor* does not apply; *Cook v. Grant*, 16 Id. 564; *Robinson v. Justice*, 21 Id. 407; *Parham v. Randolph*, 35 Id. 403; *Cullum v. Branch Bank*, 37 Id. 725; note to *Georgy v. Johnson*, 44 Id. 289; *Carson v. Baillee*, 57 Id. 659; *Wintz v. Morrison*, 67 Id. 658; *Bryant's Ex'r v. Boothe*, 68 Id. 117; *Cooper v. Singleton*, 70 Id. 333; *Page v. Parker*, 80 Id. 172; *Lloyd v. Farrell*, 86 Id. 563. Thus it is a fraud on the part of the vendor to conceal the fact that part of the land contracted for belongs to a third person: *Cook v. Grant*, 16 Id. 564; or being aware of a defect in the title, to conceal it from the vendee, or to suppress an instrument by which an encumbrance had been created: *Cullum v. Branch Bank*, 37 Id. 725; or to conceal a defect in title to land which does not appear on the face of the title deeds: *Bryant's Ex'r v. Boothe*, 68 Id. 117; but a fraudulent concealment of title cannot be imputed where the party was ignorant of his title: *Robinson v. Justice*, 21 Id. 407. A vendor having knowledge of a defect in his title cannot bind his vendee, ignorant of the facts, by an agreement to assume all the risk of the title; the concealment of the facts in such a case is a constructive fraud: *Lloyd v. Farrell*, 86 Id. 563. Asthma in a slave is not a disease of such visible character that the vendee is bound to know the stage to which it has reached: *Hanks v. McKee*, 13 Id. 265. Mere concealment, however, where there is no special trust between the parties, and no legal or equitable obligation not to conceal implied in the circumstances of the case, will not invalidate the sale: *Rockafellow v. Baker*, 80 Id. 624; *Mills v. Lee*, 17 Id. 118; *Story on Sales*, sec. 381. But if there be any relation of special trust, or if the circumstances imply an obligation on the part of the vendor to divulge all that he knows in respect to the subject-matter, any concealment by him is a fraud: *Story on Sales*, sec. 381. A distinction, however, must be drawn between the concealment of extrinsic facts bearing on the contract of sale, and operating as an inducement thereto, such as the state of the market, etc., and

the concealment of intrinsic qualities of the subject-matter affecting its nature and condition, such as natural defects. The rule with respect to extrinsic facts is, that the vendor is not ordinarily bound to make them known to the vendee, nor to answer any inquiries of his in regard to them. The vendor, however, must be careful not to misrepresent, for that is a positive act, and he is only absolved from liability so long as his conduct is completely negative: See note to *Hanks v. McKee*, 13 Am. Dec. 267; Story on Sales, secs. 174-178.

While the law "will never help injustice or countenance the slightest immorality, yet it must leave many duties to the honor and conscience of the individual": Story on Sales, secs. 174, 178. Thus it has been held that if in a contract of sale the vendor knowingly allows the vendee to be deceived in respect to the subject-matter of the sale, his silence will, under certain circumstances, be considered fraudulent; for although the vendor is not bound to give the vendee all the information which he possesses, yet he is not therefore to be permitted to be silent when his silence operates virtually as a fraud. Thus where the agent of the vendor of a picture, knowing that the vendee labored under a delusion with respect to it, which materially influenced his judgment, permitted him to make the purchase without removing that delusion, the sale was held to be void: *Hill v. Gray*, 1 Stark. 434. With respect to intrinsic qualities, the rule is that mere silence in respect to any defect which the vendee might by proper caution have discovered, and where the subject-matter of sale is open to his inspection, is not a fraud, unless a special trust and confidence be reposed in the vendor by the vendee, or grows out of the peculiar circumstances of the case. If, however, any artifice be employed to disguise the article sold, or to prevent a fair and thorough examination by the buyer, the sale is voidable: See note to *Hanks v. McKee*, 13 Am. Dec. 267; *Moore v. Turbeville*, 5 Id. 642; *Robinson v. Justice*, 21 Id. 407; *Brown v. Gray*, 72 Id. 563; *Rockafellow v. Baker*, 80 Id. 624; *Bean v. Herrick*, 12 Me. 262; *Matthews v. Bliss*, 22 Pick. 48; *Smith v. Countryman*, 30 N. Y. 681; *Bevans v. Farrell*, 18 La. Ann. 232. And a concealment of any latent defect which could not have been discovered by the vendee through the exercise of proper diligence will avoid the contract and make the vendor liable in damages; because it is a direct fraud on the purchaser not to inform him in a case where an implied trust is necessarily created by the circumstances: *Ingram v. Morgan*, 40 Am. Dec. 626; *Rockafellow v. Baker*, 80 Id. 624; note to *George v. Johnson*, 44 Id. 289; *Wintz v. Morrison*, 67 Id. 658; *Brown v. Gray*, 72 Id. 563; *Cecil v. Spurger*, 82 Id. 140; *Hadley v. Clinton Co. Imp. Co.*, 82 Id. 454; *Bevans v. Farrell*, 18 La. Ann. 232; *Case v. Ayers*, 65 Ill. 142; *Baglehole v. Walters*, 3 Camp. 154; *Schneider v. Heath*, 3 Id. 506; *Matthews v. Bliss*, 22 Pick. 48; *Doggett v. Emerson*, 3 Story, 700; note to *Booles v. Round*, 5 Ves. Jr. 508. And this rule applies where the thing has been sold "with all its faults": *Baglehole v. Walters*, 3 Camp. 154; *Schneider v. Heath*, 3 Id. 506. A vendor is bound in good faith to state what defects he knows of in the thing sold where the purchaser has no reasonable means of informing himself: *Bevans v. Farrell*, 18 La. Ann. 232. Thus the suppression of defects of title by the vendor, who sells with full covenants of warranty, having only a bond for the title, is a fraud upon the vendee: *Ingram v. Morgan*, 40 Am. Dec. 626; and the concealment by a vendor of horses of the fact that they have a contagious disease of a fatal character to his knowledge, such disease not being discoverable by such an examination as a careful man would make before buying, entitles the purchaser to rescind the contract, and to recover damages for the fraud, especially where such com-

concealment is accompanied by actual misrepresentations accounting for any suspicious appearances in the animals: *Wink v. Morrison*, 67 Am. Dec. 658; *Jones v. Quick*, 28 Ind. 125; *Paddock v. Strobridge*, 29 Vt. 470. So with the concealment of asthma in a slave: *Hanks v. McKee*, 13 Id. 235. So also if a vendor should sell an estate to which he knew that he had no title, but of which he was in possession: *Arnot v. Biscoe*, 1 Ves. Sr. 95; or if he should sell goods or land which he knew to be mortgaged without giving information thereof to the purchaser: Id.; or if he should sell a house which he knew to be burned down: Pothier, *Contrat de Vente*, note 4, — the sale would be fraudulent, and would be set aside in equity, upon the ground that the purchase implied a trust or confidence on the part of the vendee that no such defect existed, and silence would, on such a point, be equivalent to an assertion that the vendor had a good title, or that the house existed, or that there were no encumbrances: *Edwards v. McLeay*, 2 Swanst. 287; *Peto v. Blades*, 5 Taunt. 657; *Fuller v. Wilson*, 3 Q. B. 58.

Specific performance will not be decreed where there has been a concealment on the part of the vendor: *Shirley v. Stratton*, 1 Brown Ch. 440. So in a sale at auction, in which the article sold is professedly offered to the public for sale to the highest bidder, the employment of unlimited by-bidders or puffers, of whom the actual bidders had no notice, would be fraudulent, because it would be an improper concealment of a material fact from the bidders: *Bramley v. Atk*, 3 Ves. Jr. 620, note 625; *Smith v. Clarke*, 12 Id. 477; *Veazie v. Williams*, 8 Story, 623; S. C., 8 How. 134. No confidential relations exist where the facts are equally accessible to both parties: *Rockafellow v. Baker*, 80 Am. Dec. 624; *Mitchell v. Zimmerman*, 51 Id. 717; note to *Saunders v. Hatterman*, 37 Id. 405; *Stewart v. Dugin*, 28 Id. 348; *Bean v. Herick*, 28 Id. 176; *Whitaker v. Bastwick*, 75 Pa. St. 229; *Carondelet Iron Works v. Moore*, 78 Ill. 65; *Roberts v. Hughes*, 81 Id. 130; *Phelps v. Buckman*, 30 Pa. St. 401; *Oncida Mfg. Soc. v. Lawrence*, 4 Cow. 440; *Smith v. Countryman*, 30 N. Y. 681; and every person reposes at his peril in the opinion of others when he has an equal opportunity to form and exercise a correct judgment of his own: *Mitchell v. Zimmerman*, 51 Am. Dec. 717. Where the facts are equally accessible to both vendor and vendee, the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in doing so: *Armstrong v. Bufford*, 51 Ala. 410; or hinder or obstruct the purchaser in his attempts to find out defects or blemishes for himself: *Roseman v. Canovan*, 43 Cal. 110. Where personal property sold at auction is at the time remote from the place of sale, the purchaser, being ignorant of its condition, and having had no opportunity to examine it, has a right to rely upon the statements of the seller: *Overbay's Adm'r v. Lighty*, 27 Ind. 27; but the purchaser must inspect lands for himself, whether "five or five hundred miles from his residence": *Sherwood v. Salmon*, 2 Day, 136; *Boyd v. Bopet*, 2 Dall. 91; note to *Snyder v. Laframboise*, 12 Am. Dec. 191. The doctrine of *caveat emptor*, however, does not apply when from the nature of the article sold its value and peculiar properties can be determined only by scientific knowledge possessed by the vendor, and of which the purchaser is ignorant, as in the case of drugs sold to a customer: *Jones v. George*, 56 Tex. 149; S. C., 42 Am. Rep. 689. As to when this maxim was held not to apply to a sale of coupon bonds, see *Porter v. Bright*, 82 Pa. St. 441. The rule in executory contracts of sale is *caveat venditor*, not *caveat emptor*: *Howard v. Hoy*, 35 Am. Dec. 572. The common-law rule of *caveat emptor* has been more distinctly rejected in the states of Louisiana and South Carolina than any others: *McAncon v. Robichaux*, 17 La. 101; *Huntington v. Lowe*, 3 La. Ann. 377; *Barnard v. Yates*, 5

Nott & McC. 142; *Ross v. Beattie*, 2 Id. 538; but see *Carmochan v. Gould*, 1 Bailey, 179; *Wood v. Ashe*, 1 Strob. 407.

A mistake in the representation of a fact material to the contract of a sale is sufficient ground for setting it aside: *Alvares v. Brannan*, 68 Am. Dec. 274; *Daniel v. Mitchell*, 1 Story, 172; but there are circumstances under which the vendee cannot maintain the objection that he made an offer under a mistake of fact, and was therefore not bound by it: See *Wheat v. Cross*, 31 Md. 99. A party who undertakes to sell land which he has already conveyed to another is, in construction of law, responsible for a fraud upon the purchaser, although at the time he made the second deed he had forgotten that he had executed the prior conveyance, and had no intention to deceive or defraud the second purchaser: *Alvares v. Brannan*, 68 Am. Dec. 274. If after a purchase the buyer makes no objection after discovering the seller's deceit, but deals with the article as his own, or keeps it for an unreasonable length of time, the contract will be considered to be ratified by him: *Wilson v. Fisher*, 5 Houst. 395; *Hadley v. Prather*, 64 Ind. 137; *Cates v. Bales*, 78 Id. 285. And if upon discovery of fraud he still continues to deal with it as his own, he cannot, upon discovery of another incident in the same fraud, repudiate it: *Campbell v. Fleming*, 1 Ad. & E. 40. The question as to whether there was fraud in a sale is one for the jury to determine: *Sledge v. Scott*, 56 Ala. 202; *Warren v. Philadelphia Coal Co.*, 83 Pa. St. 437; *Anderson v. Burnett*, 35 Am. Dec. 425; *Miles v. Stevens*, 45 Id. 621; and *Hadley v. Clinton Co. Imp. Co.*, 82 Id. 454, where the subject of presumptions, evidence, and instructions in such cases is discussed, particularly with respect to the concealment of material latent defects. The question, also, as to whether any particular fact is material or immaterial to the sale is one for the jury: *Lindeman v. Desborough*, 8 Barn. & C. 586. So must the jury determine whether expressions used in making a sale are those of opinion or of fact: *Foster v. Kennedy's Adm'r*, 81 Am. Dec. 56; *Morse v. Shaw*, 124 Mass. 59. Upon the subject, generally, see extended note to *Emerson v. Brigham*, 6 Am. Dec. 117, 118; note to *Hughes v. Robertson*, 15 Id. 106-108, on fraudulent concealment in sales; note to *Saunders v. Hatterman*, 37 Id. 405; and the very valuable cases of *Smith v. Countryman*, 30 N. Y. 655, 681; *Hadley v. Clinton Co. Imp. Co.*, 13 Ohio St. 502; S. C., 82 Am. Dec. 454. The case last cited contains a most excellent exposition of the law of sales, so far as the case covers the subject under consideration.

ALEXANDER v. HARRISON.

[38 MISSOURI, 255.]

ACTION FOR MALICIOUSLY SUING OUT ATTACHMENT CANNOT BE SUSTAINED UNLESS IT IS PROVED by satisfactory evidence that the plaintiff in the attachment knew that he had no cause of action whatever against the defendant, and that he also acted maliciously therein.

IN ACTION ON ATTACHMENT BOND, PLAINTIFF CAN ONLY RECOVER NATURAL AND PROXIMATE DAMAGES resulting from the attachment; but he may also sue in a special action on the case for a malicious abuse of the attachment process, and recover damages beyond the natural and proximate actual damages resulting from the attachment.

CLIENT CANNOT BE HELD LIABLE IN ACTION FOR MALICIOUSLY SUING OUT ATTACHMENT where he has fairly submitted all the facts of the case to his counsel in good faith, and is advised by them that he has a cause of action against the defendant in the attachment, and merely pursues the course recommended by them, relying upon the correctness of their legal opinion. Malice cannot be imputed to him in such a case, and it is error to instruct the jury in such manner that they may so find. Neither is there a want of probable cause.

MALICE IN SUING OUT ATTACHMENT PROCESS CONSISTS IN IMPROPER MOTIVE, not necessarily any positive malignity or corruption, but a willful disregard of the rights of others, "whether it be to compass some unlawful end, or some lawful end by unlawful means, or to do a wrong and unlawful act, knowing it to be such." Thus it would be malice enough that an attachment is sued out by a person who knows that he has no cause of action, for this would merely be to vex, harass, and injure the party sued.

ATTORNEY IS COMPETENT WITNESS, IN ACTION FOR MALICIOUS ATTACHMENT, where he consulted with counsel upon the case in which the attachment issued, and may testify as to what opinion was given to the plaintiff in the attachment suit by such counsel.

IF THERE IS NO EVIDENCE TO SUPPORT ISSUE, IT IS COURT'S DUTY TO SO INSTRUCT JURY.

INSTRUCTION IS OBJECTIONABLE IF IT LIMITS ISSUE TO PARTICULAR FACTS. SUPREME COURT WILL REVERSE JUDGMENT WHERE THERE WAS NO EVIDENCE TO SUPPORT VERDICT.

THE facts are stated in the opinion. The instructions are not of sufficient importance to give at length. The second and third instructions which were refused for the defendants sustained the third section of *syllabus, supra*. The third instruction given for the plaintiff directed the jury to find for the plaintiff on the second count if they believed that the attachment suit was brought maliciously and without probable cause; and to assess such exemplary damages as they might believe from the circumstances of the case as detailed in the evidence the plaintiff ought to recover. They were directed, however, not to allow damages on account of any matter for which they had allowed damages on the first count or cause of action. The instruction given by the court of its own motion was: "If the jury find from the evidence that the present defendants brought their suit in Illinois against Alexander on the advice of counsel reasonably skilled in the law, and that said counsel was apprised of the facts relating to the claim against Alexander; and that said suit was brought in good faith, to recover what the plaintiffs in that suit, on the advice of their counsel, believed to be a legal claim against said Alexander, —then the defendants in this suit had probable cause for bringing their said attachment suit, and are entitled to a ver-

dict on the second count or cause of action." The jury were also instructed by the court to find a separate verdict on each count of plaintiff's petition.

Hill and Jewett, for the appellants.

G. P. Strong, for the respondent.

By Court, HOLMES, J. The petition contained two counts. The first count was founded upon a wrongful suing out of an attachment merely; the second was based upon the ground that the attachment suit was malicious and without probable cause. The plaintiff recovered \$950 damages on the first count, and \$2,000 on the second. No question is raised here under the first count, and the consideration of the case will be confined to the second count.

The defendants insist that the court below erred in instructing the jury on the question of malice and want of probable cause, and in excluding testimony as to what was the opinion and advice of one of the counsel employed to bring the suit.

The facts proved would seem to have been substantially these: That the defendants held certain notes as assignees, which had been drawn by the plaintiff in his capacity of treasurer of the Ohio and Mississippi Railroad Company, running in his name, and signed "J. H. Alexander, Treas. Ohio & Miss. R. R. Co."; that it was known to the defendants and their attorneys that these notes had been given in the business of the corporation, and that the plaintiff had executed them in his official character only; that the defendants, being unable to collect the notes of the company or other parties, placed them in the hands of an attorney, after consulting with him on the subject, for collection by suit against the plaintiff here, in the state of Illinois, where he owned the lands which were attached; that the attorney took them for collection by suit against the plaintiff, provided that upon consultation with other counsel at Belleville they should be of the opinion that the plaintiff was individually liable on notes drawn and signed in this manner; that this idea was first suggested to the defendants by the attorney, and that the whole conduct of the matter was left by them to the judgment of their counsel, and the entire proceedings afterwards were directed by the attorneys; that the attorney spent a whole day in examining books on the question of law in the office of the other counsel with whom he consulted, and came to the conclusion that the

plaintiff was liable individually on the notes as maker; and thereupon the attachment suit was brought by the other counsel in person, and was prosecuted by them for several years in the courts, until it was finally dismissed. The evidence further tended to show that the first attorney had been many years in the practice of law in that state, though for the last five years previous he had been also largely engaged in speculative operations beyond the sphere of professional practice; and the other counsel was a practicing attorney of long standing at the bar, and possessed of experience and ability in the profession. We find nothing in the evidence that has the least tendency to prove any want of diligence, honesty, or good faith on the part of these attorneys. Nor have we been able to discover any just ground for charging these defendants with any malicious, wicked, sinister, or evil motive, or any unlawful purpose, in what they did.

The question of malice and want of probable cause does not arise upon the truth of the affidavit made for an attachment, nor upon the rights of the plaintiffs therein to have that form of process. The ground of the attachment was non-residence of the defendant; and that was true. The matter of actual damages on a wrongful attachment merely was disposed of under the first count. There is no doubt that he may also sue in a special action on the case for a malicious abuse of the attachment process, and recover damages beyond the natural and proximate actual damages resulting from the attachment: *Roe v. Thomas*, 19 Mo. 613. The case here must depend wholly upon the right to sue at all upon these notes, and the malice and want of probable cause must consist not merely in taking out the process of attachment when they were not entitled to have that process, but in suing the plaintiff here at all on these notes, and using the attachment process in aid of his suit when there was no cause of action against him. In such case, this action cannot be sustained unless there be satisfactory evidence that the plaintiffs there knew when they commenced their suit that they had no cause of action whatever against the defendant therein, nor unless they acted maliciously in that behalf: *Drake on Attachment*, 2d ed., sec. 734.

It does not appear that the clients withheld any information from their counsel, or did anything to procure an opinion which might protect them against a suit for damages, nor that they gave any particular directions about the suit; but it

would seem to be very plain that, being doubtful of their legal rights, they submitted the matter to counsel learned in the law with a view to ascertain the liability of the party to be sued on these notes, and that they did nothing more than to pursue the course pointed out by their legal advisers. How can they be charged with malice and want of probable cause on such a state of facts as this? There is nothing in the evidence to show that the notes were used as a mere pretense for a cause of action, nor that the real object was to vex, harass, and injure the person sued. Neither does the evidence prove that the attorneys or either of them were so unskillful, incompetent, or ignorant of their profession that the mere fact that they were employed in the business can be taken as proof of bad faith, evil design, or malicious purpose on the part of the defendants. There is no proof of dishonesty or sinister purpose on the part of the attorneys. There was no satisfactory evidence of malice on the part of the defendants. Malice is the essential thing in these cases. The malice required has been defined with great accuracy and precision as consisting in an improper motive, not necessarily any positive malignity or corruption, but a willful disregard of the rights of others, "whether it be to compass some unlawful end, or some lawful end by unlawful means, or to do a wrong and unlawful act, knowing it to be such,"—as when an attachment is sued out by a person who knows he has no cause of action, he may be deemed to have intended thereby to vex, harass, and injure the party sued; and this would be malice enough: *Drake on Attachment*, 2d ed., sec. 733; *Ives v. Bartholomew*, 9 Conn. 313; *Kirksey v. Jones*, 7 Ala. 622.

The malice here supposed is predicated wholly upon the ground that the defendants and their attorneys had knowledge that the notes were made by the plaintiff in his capacity of treasurer, and in the business of the corporation, and that he was not himself personally liable on the original indebtedness for which the notes were given. But the question whether he had drawn and signed these notes in such manner as to make himself personally liable on the instruments was a matter of law; and this was the very question which was submitted to the judgment of counsel. So far as appears, it was examined and considered by them with diligence and in good faith. It was in itself no mere pretense of a legal question; nor does it appear to have been used as such by the parties concerned. It was admitted on the argument that the older authorities

would uphold such a liability, though the course of later decision on the point had been the other way. Conceding the conclusion arrived at by the attorneys to have been erroneous, it amounted to nothing more than that they were mistaken in the law, and gave wrong advice to their clients. Where the clients merely pursue the course recommended by their counsel, relying upon the correctness of their legal opinion, they cannot be held liable to this action: *Stone v. Swift*, 4 Pick. 393 [16 Am. Dec. 349]. Malice cannot be imputed to them in such case, and it is error to instruct the jury in such manner that they may so find. It has been said by a learned judge that if there be a spark of evidence, it must go to the jury; we have not found a *scintilla* here.

The testimony of one of the attorneys as to what was the opinion and advice of the other was excluded. This was a material substantive fact by itself, and a part of the issue. It was not mere hearsay. It was to be proved as a matter of fact and a part of the transaction. We think the witness was as competent to prove this fact as to prove what was his own opinion and what advice he gave. That he concurred in opinion with the other attorney would seem to have been necessarily to be inferred from the testimony which was admitted; and this error alone might not have been very important.

We think the second and third instructions which were refused for the defendants should have been given. The first one was objectionable as limiting the issue to particular facts. The second instruction given for the plaintiff should have been refused. It had no sufficient foundation in the evidence.

It supposes that the attorneys had retired from the profession, and were not familiar with law and the practice at the time when they were consulted. The evidence did not show such a state of facts, but rather quite the contrary. It was partly predicated, also, on the ground that the parties suing knew that Alexander did not justly owe the debt for which he was sued. This was immaterial. It did not depend on the abstract justice of the debt, but on the legal liability. If the party were liable in law, it made no difference that the notes were given for the debt of another. An accommodation indorser, a surety, or an agent who has failed to bind his principal, may be liable personally, though the debt be not his own. The debt was not justly due from him, otherwise than as he was legally liable to pay it; but if he were liable in law,

that was enough. The courts know no other justice than the justice of the law. We think the instruction had a direct tendency to mislead the jury.

The third instruction given for the plaintiff was correct enough as an abstract proposition of law; and if there had been evidence on which it was proper to submit such an issue to the jury, there could be no objection to it. It is a matter of no little difficulty to determine when there is some evidence and where there is no evidence to support an issue. The proof of malice here was exceedingly slight, if any at all; the malice was of the very essence of the cause of action, as well as the want of probable cause; and on the whole, we are constrained to say that the evidence did not justify the giving of such an instruction.

The instruction that was given by the court of its own motion was entirely correct in itself, and placed the issue fairly before the jury on the side of the defendants; and if there had been no other instructions, it is hardly to be supposed that the jury could have found the same verdict under this alone. The defendants' instructions were refused. The instructions given for the plaintiff authorized the jury to believe that there was a case before them on the evidence which would warrant them in finding a verdict for the plaintiff. The cause being submitted to them in this manner, and the case showing some hardship and perhaps considerable loss, on the part of the plaintiff, with some circumstances of aggravation, and with full scope for plausible argument, there is no wonder at the verdict found by the jury. But upon a careful consideration of the whole case, and in view of the just rules of law which ought to govern in such a matter, we find it impossible to give our sanction to this verdict.

As the whole matter seems to turn at last upon a question of law on the whole evidence, we see no occasion for sending the case back for a new trial on this count. The judgment will therefore be reversed; and proceeding to give such judgment here as ought to have been given below, the plaintiff will have judgment here for the amount of the verdict on the first count, with interest from the date of the rendition of the judgment below.

WAGNER, J., concurred.

LOVELACE, J., absent.

which a previous action is founded, or create a new bar by which such action may be defeated.

STATUTE AMENDATORY OF CHARTER OF INSURANCE COMPANY, making the company's certificate of indebtedness conclusive evidence in all suits of the facts therein stated, is retrospective as to all causes of action originating prior to its passage, and is to that extent unconstitutional.

THE facts are stated in the opinion.

John C. Orrick, for the plaintiff in error.

By Court, **WAGNER, J.** The plaintiff in error, on the twenty-first day of September, 1860, issued and delivered to the defendant in error a policy of insurance for two thousand dollars on his house and furniture in Audrain County, Missouri, for the period of six years. Under a provision of the policy, the plaintiff in error canceled the same on the — day of —, 1863, and demanded payment of the premium which was claimed to be due up to that date. On the twenty-sixth day of January, 1864, an act was passed by the general assembly of the state of Missouri by way of amendment to the charter of plaintiff in error, which act, among other things, provided as follows:—

"Sec. 22. Whenever it shall become necessary to bring suit against any party for any assessment or other indebtedness now due or hereafter due to the company, the said company shall not be compelled to produce its books or papers in any court or tribunal in which said suit, action, or other proceedings may be pending or tried, and a certificate signed by the president or vice-president and secretary of said company, with its corporate seal affixed, stating that the party is indebted to the company for the amount named in said certificate, shall in all such suits, actions, or proceedings be conclusive evidence of the facts therein stated": Laws of Mo., Adj. Sess. 1863, p. 352, sec. 22.

In May, 1864, plaintiff sued defendant before a justice of the peace in St. Charles County for twenty-five dollars, the amount claimed to be due when the policy was canceled, and judgment was given in its favor. Defendant appealed to the circuit court, and on the trial there plaintiff introduced the certificate of indebtedness signed by the president and secretary, with the corporate seal affixed, as evidence of defendant's indebtedness, which was excluded by the court. No other evidence was offered by either party, and the court found for the defendant and rendered judgment in his behalf.

The sole question presented by the record is, Had the legislature the constitutional power to declare that the certificate should be conclusive evidence of the fact of indebtedness?

The constitution of the state says that "no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, can be passed."

A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, is to be deemed retrospective or retroactive: Sedgwick on Statutory and Constitutional Law, 188.

The right of the legislature to change the remedy and prescribe rules of evidence, if its enactment does not create a new obligation or attach a new disability retrospectively, is conceded; but it is not within the constitutional competency of the legislature to annul by statute any legal ground on which a previous action is founded, or to create a new bar by which such action may be defeated.

No new ground for the support of an existing action ought to be created by legislative enactment, nor any legal bar which goes to deprive a party of his defense. The twenty-second section of the amendatory charter makes the certificate conclusive evidence of indebtedness, and deprives the defendant of any defense which he might have, however just or legal. When the contract was entered into and the action accrued he had the undoubted right by the law of the land to appear and defend himself, and defeat the plaintiff's right of action by competent proof; this act denies him that privilege, and attaches to him a new disability.

If the evidence is conclusive, it admits of no countervailing testimony which would constitute a defense, and the appearance of the defendant in court when his hands are tied and his lips sealed by act of the law would be at best a solemn mockery.

Under the law as it existed when the defendant's liability was incurred, he had the right to make any defense consistent with the rules of law. The act in question virtually debars him from the exercise of that right. Had the act merely provided that the certificate should be evidence or *prima facie* evidence of the facts stated in it, it would have been unobjectionable and within the scope of the legislative power; but when it proceeds to give it a conclusive character, it divests

the defendant of an antecedent right, and attaches to him a new bar and disability.

The judgment must therefore be affirmed.

The other judges concurred.

RETROSPECTIVE LAWS, MEANING OF CONSTITUTIONAL PROVISION PROHIBITING: *Sutherland v. De Leon*, 46 Am. Dec. 100; extended note to *Gooken v. Stonington*, 10 Id. 131-140, wherein is discussed the right to deny a defense.

RETROSPECTIVE OR RETROACTIVE LAW IS CONSTITUTIONAL, WHEN: *Raele v. Kennedy*, 58 Am. Dec. 289; *Wynne's Lessee v. Wynne*, 58 Id. 66; *Baugh v. Nelson*, 52 Id. 694; *Parkinson v. Bracken*, 39 Id. 296; *Schenley v. Commonwealth*, 78 Id. 359, note 369; note to *Bleakney v. Farmers' etc. Bank*, 17 Id. 637.

RETROACTIVE OR RETROSPECTIVE LAW IS UNCONSTITUTIONAL, WHEN: See note to *Greenough v. Greenough*, 51 Am. Dec. 574; *Coffin v. Rich*, 71 Id. 559; *Schenley v. Commonwealth*, 78 Id. 359, note 369.

LEGISLATIVE CONTROL OVER REMEDIES: *Baugh v. Nelson*, 52 Am. Dec. 694; *Coffin v. Rich*, 71 Id. 559; *Flournoy v. City of Jeffersonville*, 79 Id. 468; *Scobey v. Gibson*, 79 Id. 490, note 494; *Holloway v. Sherman*, 79 Id. 537, note 538; *Robinson v. Magee*, 70 Id. 638.

THE PRINCIPAL CASE WAS CITED TO the second point of the syllabus, *supra*, in *Barton Co. v. Walser*, 47 Mo. 201; and to the fourth point in *Denver etc. R'y Co. v. Woodward*, 4 Col. 167. It was quoted from in *City of St. Louis v. Clemens*, 52 Mo. 144, to the effect that no new ground of support of an existing action ought to be created by legislative enactment, nor any legal bar which goes to deprive a party of his defense, etc.

WEIL v. TYLER.

[38 MISSOURI, 545.]

NO SPECIFIC DEMAND IS REQUIRED ON NOTE PAYABLE ABSOLUTELY IN MONEY ON DEMAND. The commencement of a suit is a sufficient demand.

SPECIFIC DEMAND MUST BE MADE ON NOTE PAYABLE IN SPECIFIC ARTICLES OF PERSONAL PROPERTY, where no day or place of payment is mentioned, or fixed by some clear and certain implication of law.

CONTRACT TO PAY IN SPECIFIC ARTICLES OF PERSONAL PROPERTY BECOMES MONEY DEBT only after a demand and refusal to pay over the specified property, and no money judgment can be rendered on such contract until that time.

ATTACHING CREDITOR ONLY ACQUIRES SUCH RIGHTS AGAINST GARNISHEE AS DEBTOR POSSESSED, and no process or proceedings can place the garnishee in a different or worse position than he would have occupied if sued directly by the debtor in the attachment suit.

GARNISHEE IS NOT LIABLE IN ATTACHMENT UNLESS DEBT IS DUE IN MONEY. It is only a debt due in money that can be garnished. A debt or note for specific articles cannot be garnished.

THE facts are stated in the opinion.

S. A. Holmes and C. H. Chapin, for the appellant.

Davis and Evans, for the respondents.

By Court, WAGNER, J. The appellant was summoned as garnishee of one Henry Bucking, and in his answer denied all indebtedness otherwise than upon a certain due-bill, of which the following is a copy:—

“St. Louis, Mo., November 16, 1860. Due Henry Bucking one thousand dollars in brandy at five dollars per gallon. We will let him have one or two barrels of fine whisky on the above amount. This is for commissions. C. H. Tyler & Co.”

The due-bill was indorsed, and there was an interplea filed, but the issue was found against the claimant; and as it has no material bearing on the question raised by the record, it will not be further noticed.

Upon a trial before the court, a jury being waived, no evidence was given that a demand was ever made for the brandy mentioned in the due-bill; but there was evidence tending to show that the appellant had the brandy, and had always been ready and willing to deliver the same when legally demanded or called for. The court decided that a special demand for the delivery of the brandy previous to the service of the garnishment was not necessary, and then rendered judgment against the garnishee for the amount in money.

Notes for the payment of money absolutely on demand require no specific demand; the commencement of a suit is a sufficient demand. But the rule is otherwise with respect to notes payable in specific articles, where no day or place of payment is mentioned, or is not fixed by some clear and certain implication of law. Thus where the note was payable in farm produce on demand, and neither time nor place of payment was specified, it was held that before an action could be maintained a specific demand should have been made at the farm of the debtor: *Loddell v. Hopkins*, 5 Cow. 516. Where a party has agreed or obligated himself to pay in specific articles, he cannot be charged or proceeded against as for a money debt till demand is made, and there is a refusal or neglect on his part to perform the contract; for until then he is in no default, and he has a right to insist on the terms of his agreement. And on obvious principles, courts have no right to interfere with the contracts between parties, and to make one party pay money when by the terms of his contract he has agreed to pay, and the other party has agreed to receive, something else.

As long as a party is ready and willing to comply with his contract, he is entitled to stand by it, and it is only when he has been guilty of a breach that he is chargeable in a different manner.

An attaching creditor only acquires such rights against the garnishee as the debtor possessed, and no process or proceedings can place the garnishee in a different or worse position than he would have occupied if sued directly by the debtor in the attachment suit.

The payee in the note or due-bill could not have sustained his suit and obtained a money judgment without having made a prior demand and met with a refusal on the part of the payor to deliver the brandy; and the attaching creditor cannot pretend to stand in any more favorable attitude: *Drake on Attachment*, sec. 550; *Bartlett v. Wood*, 32 Vt. 372; *Stadler v. Parmlee*, 14 Iowa, 175; *Minns v. Parker*, 1 Ala. 421; *Wrigley v. Geyer*, 4 Mass. 102; *McMinn v. Hall*, 2 Over. 328; *Smith v. Chapman*, 6 Port. 385; *Willard v. Butler*, 14 Pick. 550; *Blackburn v. Davidson*, 7 B. Mon. 101.

The judgment will be reversed and the cause remanded.

FAGG, J., concurred.

HOLMES, J., having been of counsel, did not sit.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: An action does not lie for the value of wheat, which is to be delivered in payment of a debt when thrashed, until demand has been made for the wheat: *State v. Mooney*, 65 Mo. 496. A written promise "to pay to the bearer the sum of twenty thousand feet of good, salable lumber, for value received of him," is a promissory note, possession of which is *prima facie* evidence of title: *Spears v. Bond*, 79 Id. 470. The principal case again came before the court in *Weil v. Tyler*, 43 Id. 582, where it was held that it is only a debt due in money that can be garnished, and it must be also shown to be unaffected by liens, or prior encumbrances, or conditions of contract.

WARFIELD v. LINDELL.

[33 MISSOURI, 561.]

ESSENCE OF TENANCY IN COMMON CONSISTS IN UNITY OF POSSESSION. It is the only unity required of tenants in common, and they hold by unity of possession.

POSSESSION OF ONE CO-TENANT WILL BE PRESUMED TO BE POSSESSION OF ALL.

PRESUMPTION AS TO POSSESSION OF CO-TENANT. — One who enters into possession of land under deed making him a tenant in common with other

parties will be presumed to have entered into possession under his deed, and by virtue of the title acquired thereby.

THERE IS NO NEED OF PRESUMING DEED WHERE ADVERSE POSSESSION for time required by statute is shown, as the adverse possession of itself alone would be evidence of an estate in fee, and equivalent to an absolute title.

QUESTION OF ACTUAL OUSTER IN FACT OF ONE CO-TENANT BY ANOTHER INVOLVES ACT, intent, and notice, and the jury must determine this from the evidence. Where the acts are inconsistent with the presumption of a tenancy in common, the intent may be found from the overt acts proved in the case.

ONE TENANT IN COMMON MAY DISSEISE ANOTHER; but, in consequence of the legal presumption that the possession of one co-tenant is the possession of all, acts of exclusive possession which in case of a stranger would be deemed adverse, and *per se* a disseisin, are in cases of tenancies in common susceptible of explanation consistently with the real title.

TO EFFECT DISSEISIN OF ONE TENANT BY HIS CO-TENANT, THERE MUST BE outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenant that an adverse possession and an actual disseisin are intended to be asserted against him.

JURY WILL BE WARRANTED IN FINDING ACTUAL OUSTER OF TENANT BY HIS CO-TENANT, where the latter takes possession of the land and openly and notoriously exercises acts of exclusive ownership for a series of years, as by removing the soil, quarrying and selling rock, and by such acts as amount to the destruction of the thing itself, taking all the rents and profits without account, and by other acts which exclude the idea of his claiming as a co-tenant.

AS TO OUSTER OF CO-TENANT, JURY MUST DETERMINE WHETHER EVIDENCE IS SUFFICIENT to overcome presumption in favor of a tenancy in common. Under evidence tending strongly to show an actual ouster, the jury is not bound to find, nor should the court instruct them to find, such ouster.

CONSTRUCTIVE OUSTER. — **NOTICE OF OUSTER TO CO-TENANT MAY BE CONSTRUCTIVE**, by such open and notorious acts of ouster, or such an assertion of a claim to the exclusive possession of the whole land as in law will impart notice to the co-tenant of an adverse and exclusive claim of title.

PARTITION RECORD AND ANSWER IN EJECTMENT AS EVIDENCE OF OUSTER. — Jury, in determining whether tenant has been actually ousted by his co-tenant, may consider the effect of a partition record against the plaintiff, and the answer in a prior ejectment suit, merely as a part of the facts and circumstances on which they may infer or presume an actual ouster, or the contrary.

EJECTMENT. The facts in this case are precisely similar to those in *Warfield v. Lindell*, 77 Am. Dec. 614, with the exception that the partition record, which was there excluded, and the two deeds, which were there rejected, were in this case admitted; and it was also shown that one Whiting built a mill on the property in suit; that Peter Lindell succeeded to this

possession of Whiting some time between 1826 and 1831; that Lindell took possession of the mill, sold off the machinery, used the mill as a warehouse, built a number of houses on the lots, quarried and dressed rock on the place, and held in person and by his tenants notorious and actual possession of said lots from a period commencing between 1826 and 1831 down to the commencement of this suit; and that Lindell quarried a large amount of rock from 1822 to 1857, and took all the profits. It appeared from *Warfield v. Lindell, supra*, that Ware ratified and confirmed the partition and allotment by a deed to Mary Lisa dated June 15, 1841. Martin Thomas, through whom plaintiff Warfield and Ware both claimed all the interest which the plaintiff Warfield set up in this suit, held the title of Lisa's vendee at the sheriff's sale to all the unsold lots in said addition from October 1, 1828, until April 16, 1831. Ware acquired the same title in 1833, and held it until his death in 1850 or 1851. In the sixth instruction refused for the defendants, the jury were instructed "that knowledge of the possession of Peter Lindell by Martin Thomas, if such possession was notorious, and accompanied by unequivocal acts of exclusive ownership that were known to Thomas, is sufficient for the jury to find an ouster as against Thomas; and the continuance of such possession, if open, notorious, and adverse for more than twenty years after such knowledge of the said possession was brought home to said Thomas, will authorize the jury to find such possession adverse, and to find for the defendants if the jury find twenty years continuous adverse possession before suit by said Lindell." The questions which arose upon other instructions of the court sufficiently appear in the opinion. Defendants excepted to the instructions given by the court, exclusive of those given for themselves, and also excepted to the refusal of the court to give the instructions requested by them.

B. A. Hill, for the appellants.

Glover and Shepley, for the respondents.

By Court, HOLMES, J. The questions presented for decision arise mainly upon the instructions which were given or refused. But, as it often happens in cases like this, the determination of these depends as much or more upon the application of the law to the facts of the case than upon settling the principles of law as such. It becomes necessary, therefore, in the first instance to examine into the nature of the evidence, that

would uphold such a liability, though the course of later decision on the point had been the other way. Conceding the conclusion arrived at by the attorneys to have been erroneous, it amounted to nothing more than that they were mistaken in the law, and gave wrong advice to their clients. Where the clients merely pursue the course recommended by their counsel, relying upon the correctness of their legal opinion, they cannot be held liable to this action: *Stone v. Swift*, 4 Pick. 393 [16 Am. Dec. 349]. Malice cannot be imputed to them in such case, and it is error to instruct the jury in such manner that they may so find. It has been said by a learned judge that if there be a spark of evidence, it must go to the jury; we have not found a *scintilla* here.

The testimony of one of the attorneys as to what was the opinion and advice of the other was excluded. This was a material substantive fact by itself, and a part of the issue. It was not mere hearsay. It was to be proved as a matter of fact and a part of the transaction. We think the witness was as competent to prove this fact as to prove what was his own opinion and what advice he gave. That he concurred in opinion with the other attorney would seem to have been necessarily to be inferred from the testimony which was admitted; and this error alone might not have been very important.

We think the second and third instructions which were refused for the defendants should have been given. The first one was objectionable as limiting the issue to particular facts. The second instruction given for the plaintiff should have been refused. It had no sufficient foundation in the evidence.

It supposes that the attorneys had retired from the profession, and were not familiar with law and the practice at the time when they were consulted. The evidence did not show such a state of facts, but rather quite the contrary. It was partly predicated, also, on the ground that the parties suing knew that Alexander did not justly owe the debt for which he was sued. This was immaterial. It did not depend on the abstract justice of the debt, but on the legal liability. If the party were liable in law, it made no difference that the notes were given for the debt of another. An accommodation indorser, a surety, or an agent who has failed to bind his principal, may be liable personally, though the debt be not his own. The debt was not justly due from him, otherwise than as he was legally liable to pay it; but if he were liable in law,

that was enough. The courts know no other justice than the justice of the law. We think the instruction had a direct tendency to mislead the jury.

The third instruction given for the plaintiff was correct enough as an abstract proposition of law; and if there had been evidence on which it was proper to submit such an issue to the jury, there could be no objection to it. It is a matter of no little difficulty to determine when there is some evidence and where there is no evidence to support an issue. The proof of malice here was exceedingly slight, if any at all; the malice was of the very essence of the cause of action, as well as the want of probable cause; and on the whole, we are constrained to say that the evidence did not justify the giving of such an instruction.

The instruction that was given by the court of its own motion was entirely correct in itself, and placed the issue fairly before the jury on the side of the defendants; and if there had been no other instructions, it is hardly to be supposed that the jury could have found the same verdict under this alone. The defendants' instructions were refused. The instructions given for the plaintiff authorized the jury to believe that there was a case before them on the evidence which would warrant them in finding a verdict for the plaintiff. The cause being submitted to them in this manner, and the case showing some hardship and perhaps considerable loss, on the part of the plaintiff, with some circumstances of aggravation, and with full scope for plausible argument, there is no wonder at the verdict found by the jury. But upon a careful consideration of the whole case, and in view of the just rules of law which ought to govern in such a matter, we find it impossible to give our sanction to this verdict.

As the whole matter seems to turn at last upon a question of law on the whole evidence, we see no occasion for sending the case back for a new trial on this count. The judgment will therefore be reversed; and proceeding to give such judgment here as ought to have been given below, the plaintiff will have judgment here for the amount of the verdict on the first count, with interest from the date of the rendition of the judgment below.

WAGNER, J., concurred.

LOVELACE, J., absent.

would uphold such a liability, though the course of later decision on the point had been the other way. Conceding the conclusion arrived at by the attorneys to have been erroneous, it amounted to nothing more than that they were mistaken in the law, and gave wrong advice to their clients. Where the clients merely pursue the course recommended by their counsel, relying upon the correctness of their legal opinion, they cannot be held liable to this action: *Stone v. Swift*, 4 Pick. 393 [16 Am. Dec. 349]. Malice cannot be imputed to them in such case, and it is error to instruct the jury in such manner that they may so find. It has been said by a learned judge that if there be a spark of evidence, it must go to the jury; we have not found a *scintilla* here.

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As the whole matter seems to turn at last upon a question of law on the whole evidence, we see no occasion for sending the case back for a new trial on this count. The judgment will therefore be reversed; and proceeding to give such judgment here as ought to have been given below, the plaintiff will have judgment here for the amount of the verdict on the first count, with interest from the date of the rendition of the judgment below.

WAGNER, J., concurred.

LOVELACE, J., absent.

& S. 294 [37 Am. Dec. 569]; *Law v. Patterson*, 1 Id. 193; *Nickle v. McFarland*, 3 Watts, 165; Angell on Limitations, 467, sec. 14; *Doe v. Prosser*, Cowp. 217; *Hornblower v. Read*, 1 East, 568; 2 Greenl. Crui. Dig. 395-397.

Much stress has been laid upon the effect of the partition record against the plaintiffs. The exclusion of this record would seem to have been at least one of the reasons why the judgment was reversed on a former occasion. It was not then said, nor do we now think, that this partition, or the deeds made in confirmation of it, were evidence of any direct repudiation of all right or title in these lots; but it was said that this record was admissible in evidence as going to show remissness or negligence in not asserting any claim of right or title, and as showing facts which might form "a good ground for presuming a deed after the lapse of twenty-six years, and a continuous possession in the defendant during this period." We have already seen that the evidence produced here laid no foundation for the presumption of a deed; but we think it may be correctly said that the evidence was admissible for what it was worth, as going to show remissness in search, and negligence and failure to claim any right at that time, together with the other facts and circumstances, and the lapse of more than the full period of the statute of limitations, forming a proper ground on which it might be left to the jury to infer and presume an actual ouster. Nor do we think it furnished any proof, either by way of an admission in the petition or by virtue of any effect of the partition itself, that the plaintiffs had then no right or title in these premises. Only so many lots and parcels were then divided in partition as were then made the subject of partition. No fair inference could be drawn from this transaction, either that the parties repudiated any ownership in these lots, which were not then made the subject of partition, or even that they were omitted through ignorance or neglect. The most that can be said is, that it was a circumstance, among others, which might properly go to the jury for what it was worth, as showing acquiescence merely.

On the other hand, the answer of the defendant in the ejectment suit of *Lisa v. Lindell*, 21 Mo. 127 [64 Am. Dec. 222], had no tendency to prove an admission that he held as a tenant in common with the plaintiffs. The whole answer was to be taken together, and it distinctly placed the defense on the ground of an independent and exclusive claim of possession

and ownership adverse to the title of the plaintiff therein. It merely said in one part, that as against her suit he would show that the right and title which she claimed had been conveyed by her to another person. If that would be a bar to her recovery, it would be enough for his purpose; if not, he still stood upon his claim of title and adverse possession, whatever it might be. It had no proper tendency to prove that he was not claiming an exclusive adverse possession in the premises, even as against co-tenants; nor did it amount to any positive admission of a co-tenancy. It certainly had no effect to prove or disprove any direct act of actual ouster; but the answer, like the petition of the partition, was evidence of what it contained, and the record of the proceedings may be considered as admissible, like the partition record, for what it was worth as a part of the facts and circumstances, on which the jury might be left to infer and presume an actual ouster, or the contrary; and it might have some bearing upon the character and intent of the possession which he was then claiming.

Such being the nature of the evidence before the jury, the instructions are to be considered as predicated upon this state of the case. The principal objection to the instructions which were given for the plaintiffs points to the matter of knowledge or notice of acts of ouster. The evidence did not show that actual knowledge of any acts of ouster had been brought home to the plaintiffs or those under whom they claimed; but there was evidence tending to prove such overt and notorious acts of exclusive possession and ownership of the whole property as must, by their very nature and character, be deemed and taken in contemplation of law as amounting to an actual ouster, and as giving notice even to tenants in common, whether present or absent, of an intention to hold and assert an exclusive adverse possession against them, and therefore of an actual ouster. It belonged to the jury to weigh the force and determine the effect of this evidence, and to decide the question of an actual ouster in fact, involving the act, the intent, and the notice.

These instructions for the plaintiffs appear to be the same as those which were the subject of consideration when the case was here before: *Warfield v. Lindell*, 30 Mo. 272 [77 Am. Dec. 614]. The particular objection rests upon the words (in one clause) "until some notorious act of ouster or adverse possession is brought home to the knowledge or notice of the plaintiffs." And (in another clause), "and that the acts and the intents were

brought home to the knowledge of the plaintiffs." The direct and plain purport of this language is to require actual knowledge or actual notice to be brought home to the persons. All idea of constructive notice would seem to be clearly excluded. It was expressly declared in the former decision in this court that where there was evidence of such overt and notorious acts of exclusive adverse possession and entire ownership of such a nature that the law will presume them to be notice by persons of ordinary diligence in attending to their own interests,—or, in other words, are of such a character as of themselves to impart information and give notice of such adverse possession and ownership even to tenants in common,—proof of actual knowledge or positive notice was unnecessary, and should not be required; and it was said that "if the co-tenant is ignorant of his rights, or neglects them, he must bear the consequences." The distinction between actual and constructive notice in these cases was thus distinctly pointed out.

It is true, the words "brought home to the knowledge or notice of the others" are used by Mr. Justice Story in *Clymer v. Dawkins*, 3 How. 689; but it is sufficiently clear from the rest of the opinion that he contemplated not only actual knowledge or notice, but constructive notice also, consisting in overt and notorious acts of ouster, or an assertion of claim to the exclusive possession and the entirety of the whole land, "which, in contemplation of law, is known to the other tenants." The same purport is implied in the words of Marshall, C. J., in *McClung v. Ross*, 5 Wheat. 124, that "a silent possession, accompanied with no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession." It is here supposed that acts of ouster may be such as to amount to notice, and in contemplation of law to give notice, whether actual knowledge of them be brought home to the co-tenants or not. Such acts are "constructive notice of a claim adverse" to the other tenants in common, and such notorious adverse possession is considered to be "constructive ouster": *Parker v. Proprietors*, 3 Met. 191 [37 Am. Dec. 121]. It is said in *Lodge v. Patterson*, 3 Watts, 77, that "there must be a hostile intent, and that intent must be manifested by outward acts of an unequivocal kind"; but that "to constitute a disseisin, it was never held to be requisite that notice should be sent to the disseisee, or that it must be proved he had knowledge of the entry and ouster committed on his land." Other cases are

entirely consistent with this distinction: *Law v. Patterson*, 1 Watts & S. 184; *Prescott v. Nevers*, 4 Mass. 330. Where the acts are inconsistent with the presumption of a tenancy in common, the intent may be found from the overt acts proved in the case: 2 Greenl. Cru. Dig. 393, p. 3. But a mere verbal declaration made to some third person would not be such an overt and notorious act, nor would such an act of itself impart notice. On this matter of knowledge or notice, we think the instructions given for the plaintiffs were clearly erroneous.

Nor do we find that any other instruction was given which could have the effect to cure this error, or guard the jury against a misconception of the law on this vital point. The instruction which was given for the defendants also required actual knowledge to be brought home to the co-tenants.

We do not well see how the sixth instruction refused for the defendants on this subject of knowledge or notice could have been refused, even on the theory adopted by the court in the plaintiffs' instructions, unless it were deemed unnecessary after the jury had already been instructed on that point, that it required actual knowledge; and we think that constructive notice, consisting in a notorious adverse possession accompanied with unequivocal acts of exclusive ownership, would have been sufficient.

It is not considered worth while to examine in detail the numerous instructions which were refused for the defendants. They do not appear to have been framed with any distinct reference to the different modes of proving an actual ouster, which we have indicated above; and many of them lay undue stress upon particular facts and parts of the evidence. Hardly one of them can be said to be entirely free from objection. We shall not undertake further to point out the specific defects. By the light of the principles above laid down, and with reference to the views expressed concerning the tendency and effect of the different kinds of evidence, counsel will be enabled to frame other instructions which may be better adapted to the nature of the case made before the jury.

Judgment reversed and the cause remanded.

The other judges concurred.

POSSESSION OF ONE CO-TENANT IS POSSESSION OF ALL, UNLESS THERE BE ACTUAL OUSTER: *Warfield v. Lindell*, 77 Am. Dec. 614, and collected cases in note thereto 623; *Weaver v. Wible*, 64 Id. 696.

DEED WILL BE PRESUMED, WHEN: *Valentine v. Piper*, 33 Am. Dec. 715; *Cass's Lessee v. Inloes*, 39 Id. 658, note 686; note to *McCullough v. Wall*, 53 Id. 728.

ADVERSE POSSESSION FOR PERIOD PRESCRIBED BY STATUTE OF LIMITATIONS WILL CONFER GOOD TITLE TO LAND: *Stump v. Henry*, 61 Am. Dec. 300, and collected cases in note 304; *Robertson v. Wood*, 65 Id. 140; *Smith's Adm'r v. De la Garza*, 65 Id. 147.

OUSTER IS QUESTION OF FACT, AND IS FOR JURY: *Bolton v. Hamilton*, 37 Am. Dec. 509; *Workman v. Guthrie*, 72 Id. 654; *Peterson v. Laik*, 69 Id. 441; *Harmon v. James*, 45 Id. 296.

TENANT IN COMMON MAY DISSEISE OR OUST HIS CO-TENANTS: *Warfield v. Lindell*, 77 Am. Dec. 614; *Hutchinson v. Chase*, 63 Id. 645; *Parker v. Proprietors of Locks etc.*, 37 Id. 121; note to *Barnard v. Pope*, 7 Id. 228.

ADVERSE POSSESSION AND OUSTER OF TENANT IN COMMON BY HIS CO-TENANT, WHAT CONSTITUTES: *Warfield v. Lindell*, 77 Am. Dec. 614, note 623; *Alexander v. Kennedy*, 70 Id. 358; *Baird v. Baird's Heirs*, 31 Id. 399; *Den v. Webb*, 25 Id. 711; *Thomas v. Garvan*, 25 Id. 708; *Jackson v. Whitbeck*, 16 Id. 454; *Isard v. Bodine*, 69 Id. 595; *Phillips v. Gregg*, 36 Id. 158; *Watson v. Gregg*, 36 Id. 176; *Colburn v. Mason*, 43 Id. 292; *Town v. Needham*, 24 Id. 246; note to *Porter v. Hooper*, 29 Id. 485; note to *Harman v. Gartman*, 18 Id. 659.

JURY MAY INFER OUSTER OF TENANT IN COMMON BY HIS CO-TENANT FROM CIRCUMSTANCES, WHEN: *Warfield v. Lindell*, 77 Am. Dec. 614; *Harmon v. James*, 45 Id. 296; *Alexander v. Kennedy*, 70 Id. 358; *Meredith v. Andrea*, 45 Id. 504, note 506.

AS TO WHAT WILL NOT CONSTITUTE OUSTER OF CO-TENANT OR RAISE PRESUMPTION THEREOF: See *Peck v. Carpenter*, 66 Am. Dec. 477; *Warfield v. Lindell*, 77 Id. 614; *Bolton v. Hamilton*, 37 Id. 509.

ACTUAL NOTICE NOT NECESSARY before possession of one tenant in common may be considered as adverse to his co-tenant: *Lodge v. Patterson*, 27 Am. Dec. 335; *Warfield v. Lindell*, 77 Id. 614; *Gossom v. Donaldson*, 68 Id. 723.

CITATIONS OF PRINCIPAL CASE, AND WARFIELD v. LINDELL, 30 Mo. 272; S. C., 77 AM. DEC. 614. — To constitute disseisin of tenant in common by his co-tenants, there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenants that an adverse possession and an actual disseisin are intended to be asserted against them: *Ball v. Palmer*, 81 Ill. 372; *Bush v. Huston*, 75 Id. 348; *Campbell v. Laclede Gas Co.*, 84 Mo. 374; *Lapeyre v. Paul*, 47 Id. 590. The adverse possession of the co-tenant must be a public one, totally irreconcilable with the co-tenancy of another: *Long v. McDow*, 87 Id. 203. Without such ouster, the possession of a tenant in common is deemed the possession of his co-tenants: *Campbell v. Laclede Gas Co.*, 84 Id. 374. Where one tenant in common ousts his co-tenant, and holds exclusive possession of the premises, no action of partition will lie until the co-tenant has established his title in an action of ejectment: *Roiser v. Johnson*, 35 Id. 326. The principal case was cited to various points of the syllabus, *supra*, in *Lapeyre v. Paul*, 47 Id. 590, and in *Hamilton v. Boggess*, 63 Id. 249, as to what facts usually go to make out a case of adverse possession.

OVERTON v. ST. LOUIS MUTUAL LIFE INS. CO.

[30 MISSOURI, 122.]

INSURED DOES NOT COME TO HIS DEATH IN KNOWN VIOLATION OF LAWS OF LAND, within the meaning of a policy of life insurance containing a clause that in case the insured should die in the known violation of any law of the state, or of the United States, or of any government where he might be, the policy should be void, where he is killed in a personal rencontre while acting in the lawful defense of his person, when he had reasonable cause to apprehend a design on the part of his adversary to do him a great personal injury, and did apprehend immediate danger of such design being accomplished. If he had killed his adversary under such circumstances, it would have been a case of justifiable homicide under the statute of Missouri, and not a violation of the law.

APPEAL from St. Louis common pleas. The opinion states the case.

Krum and Decker, for the appellant.

C. D. Drake, for the respondent.

By Court, WAGNER, J. This was an action to recover the amount of a policy of insurance issued by the appellant on the life of Dudley H. Overton, late husband of the respondent. The policy contained this clause: "That in case the said Dudley H. Overton should die in the known violation of any law of this state, or of the United States, or of any government where he may be, this policy shall be void, null, and of no effect."

The sole question in controversy is as to whether Overton came to his death under circumstances which worked a forfeiture of the policy on his life within the provisions of the foregoing clause.

The evidence shows that Overton came to his death by a wound received from a pistol-ball fired by one John S. Williams in a personal rencontre which took place between them at Fulton, Missouri, on the 14th of February, 1862. The evidence is conflicting and contradictory as to which of the parties commenced the rencontre that resulted in Overton's death, though the preponderance is that Williams drew and cocked his pistol before Overton fired. The trial was before the court, a jury being waived, and at the instance of the respondent the court declared the law to be that "if the deceased, Dudley H. Overton, came to his death from a wound received by him in a rencontre between him and John S. Williams, in which rencontre pistols loaded with powder and ball were fired by each party at the other; and if the said Overton's firing off his pis-

tol was done in lawful defense of his person when there was reasonable cause for him to apprehend a design on the part of said Williams to do him a great personal injury, and also to apprehend immediate danger of such design being accomplished,—then said Overton did not come to his death in known violation of the laws of the land, and the plaintiff is entitled to recover.”

The court refused instructions asked for appellant, and then found for the respondent.

The instruction given for the respondent, though open to some criticism, is substantially correct, and asserts the principle that to exonerate Overton from criminal agency, or to preclude a forfeiture of the policy, it must be shown by the evidence that when he fired his pistol he had reasonable cause to apprehend a design on the part of Williams to do him a great personal injury, and also that he apprehended immediate danger of such design being accomplished. A killing under such circumstances, under the statute of this state, would be justifiable homicide, and not a violation of the law within the meaning of the policy. It was the province of the court to weigh the evidence, and having found for the respondent, acting under a view of the law wholly unexceptionable, we have no right or authority to interfere. The facts in this case are very similar to those in *Harper v. Phoenix Ins. Co.*, 19 Mo. 506, and the principles identically the same; and the reasoning in the opinion of that case applies with equal force in this case.

The court below therefore committed no error according to the law as heretofore laid down by this court, and its judgment must be affirmed.

The other judges concurred.

FACT THAT INSURED WAS ENGAGED IN ILLEGAL EMPLOYMENT at the time of his death will not prevent a recovery upon a policy of insurance on his life, where it does not appear that the beneficiary knew of such illegal employment or participated therein: *Lord v. Dall*, 7 Am. Dec. 38.

WHEN HOMICIDE IS JUSTIFIABLE: See *Stoffer v. State*, 86 Am. Dec. 470, note 478, where other cases in this series are collected

BENNETT'S ADMINISTRATOR v. RUSSELL'S EXECUTRIX.

[39 MISSOURI, 182.]

DENIAL OF MOTION PRECLUDES the party from subsequently maintaining a like motion on the same grounds.

ERROR to the St. Louis circuit court. The opinion states the case.

Casselberry, for the plaintiff in error.

Cline and Jamison, for the defendant in error.

By Court, FAGE, J. The record in this case presents rather a singular state of facts. It appears that on the thirtieth day of January, 1861, William Bennett recovered a judgment against Samuel Russell for \$9,338.35; that an appeal was taken to the supreme court, and the judgment affirmed at the March term, 1864. At different periods during the year 1861 Bennett made an assignment of portions of the proceeds of said judgments to various creditors to an amount in the aggregate of about the same for which he had obtained judgment. The said several sums were to be paid out of the proceeds when collected by the officer or other person authorized to receive the same. William Bennett died some time thereafter, but at what precise period is not shown.

On the 20th of February, 1865, Lackland, Cline, and Jamison, representing themselves as the attorneys of Reilly, the administrator, and also of a portion of the parties holding these assignments, and uniting with the remainder of the assignees, presented their motion to the circuit court, stating that the amount of said judgment had been paid to them, and asking for distribution of the same among all of said parties according to their respective rights. The order was made, and afterwards during the same day the said administrator, Reilly, appeared by another attorney, E. Casselberry, and filed his motion to have the order set aside and annulled for the reason that he was not a party to said proceedings, and had no notice of it whatever. This motion was overruled on the first day of April following, and the case brought here by writ of error.

It is difficult to tell why these proceedings should have been had in the names of the parties appearing upon the record. What interest the estate of Russell may have had in this matter after the satisfaction of the judgment in favor of Bennett's estate is certainly not shown by the facts in the

case. But waiving that matter, and coming directly to the points presented, it should be observed first that the question as to whether parts of one judgment can be assigned to different individuals does not arise in this case. All of the instruments executed by Bennett in favor of his several creditors purport to be an assignment of so much of the proceeds of the judgment against Russell, to be paid when collected by the officer or other person authorized to receive the same. There was no attempt to transfer a portion of the judgment itself by the assignment so as to authorize the assignee to proceed in his own name to collect the amount due him, and therefore it is not necessary to express any opinion upon that subject. The simple question was, whether there was such an appearance of Reilly, the administrator of Bennett, as to authorize the circuit court to act as to him in making the order of distribution.

The order shows that there was an appearance by Lackland, Cline, and Jamison, his attorneys. The motion afterwards filed by Reilly to set aside the order does not in express terms deny the authority of these attorneys to appear for him, but simply states the facts that he was not a party to the proceeding, and had no notice of it. This motion was afterwards heard by the court, and although there was no specific finding of the facts, yet the presumption is legitimate that this question was determined by the overruling of the motion. These facts being established, the administrator must be concluded thereby, and left to pursue whatever other remedy the law may furnish him for the attainment of his rights.

The judgment of the circuit court is therefore affirmed.

The other judges concurred.

JUDGMENT BY UNAUTHORIZED APPEARANCE OF ATTORNEY, WHETHER CONCLUSIVE: See *Hubbard v. Dubois*, 86 Am. Dec. 690, note 693; *Bunton v. Lyford*, 75 Id. 144, note 146, where this subject is discussed.

CLARK v. PACIFIC RAILROAD.

[39 MISSOURI, 124.]

DAMAGES TO BE RECOVERABLE MUST BE NATURAL AND PROXIMATE CONSEQUENCE of the act complained of.

LOSS OF GOODS BY ACT OF PUBLIC ENEMY WILL EXCUSE COMMON CARRIER to whom they have been intrusted for transportation for failure to deliver them, provided the loss be not occasioned by his own negligence or want of proper care.

ERROR to St. Louis common pleas. The opinion states the case.

Hicks and Doniphan, for the plaintiff in error.

Leighton, and Glover and Shepley, for the defendant in error.

By Court, HOLMES, J. This action is brought to recover the value of goods of the plaintiff, which were received by the carrier at Sedalia, to be transported on the railroad and delivered to the plaintiff at St. Louis.

On the arrival of the train at Jefferson City, the cars in which the plaintiff's goods were carried were detached from the train and left there for one day, and other cars were taken up in their place and carried through safely to St. Louis in that train; and upon the arrival of those cars which had been left at Miller's Landing on the train of the next day, the whole train was burned by the public enemy, and the plaintiff's goods were lost. The petition goes upon the ground that the defendant had failed to transport and deliver the property according to contract. The defense was that the goods were lost by the act of public enemies, for which the defendant was not responsible. That the defendant was not liable for a loss arising from that cause alone may be taken as admitted. But it is insisted on the part of the plaintiff that there was an inexcusable delay of some twenty-four hours at Jefferson City, and that but for that delay the train with the plaintiff's goods would have gone through safely, and no loss would have occurred.

Much was said upon the argument in reference to the order of priority in which the carrier was bound to receive and transport goods offered for transportation on the railroad, and it was urged that in making up the train at Jefferson City the defendant had no right to leave cars out of the train which had arrived there, and take up other cars at that place in their stead. There not being engines enough to carry forward the whole in the same train that day, two or three cars containing the plaintiff's goods were left, and two or three other cars loaded with hemp and tobacco were taken into the train and went safely through. This arrangement was made by the conductor. It does not appear for what special reason this was done, further than that all the cars could not be taken, and that the conductor saw proper to take those which were taken. It does not appear whether the cars which were thus taken up at Jefferson had arrived there on a previous train

from the west, or were cars which had been loaded with goods received for transportation at that station, nor what was the order of preference, if there was any, in point of time as between the goods received at Sedalia and those received at Jefferson City. So far as this question of priority is concerned, there was nothing in the evidence to show that the one set of cars had any preference or priority in the order of time over the other. Nor do we think this matter was at all material to the determination of the case. The conductor did not know what the cars which were left behind contained. He appears to have acted solely upon his own judgment and discretion in making up and forwarding the train. Nothing to the contrary appearing, it may be presumed that he performed this duty in a proper manner.

There is really no question of priority in the case. The complaint is not that the plaintiff's goods were not received for transportation in the order of priority in which they were offered, whether with reference to the particular station where they were received, or with reference to all the stations along the road. The goods were actually received, and the transportation of them had commenced; the relation of common carrier existed, and was to end only in the safe delivery of the goods; and the only real question there can be in the case is, whether the contract was performed or not, or if not, whether there was any available excuse for its non-performance.

The ground of the complaint is not that the plaintiff has been damaged in consequence of the negligence or inexcusable delay in respect to the time of delivery, but that the goods were never delivered at all; and the reason assigned for that is, that the property was destroyed by the public enemy, and by a cause for which the defendant is not responsible.

It is said if the cars had gone forward on that day they would have arrived in safety, and that therefore the defendant is responsible for the loss which happened. The carrier was not bound to keep the cars moving onward in the same train at all events. In respect to the time of delivery, the defendant was responsible only for due diligence, and was only bound to transport and deliver the goods in a reasonable time, and without unnecessary delay: *Parsons v. Hardy*, 14 Wend. 215 [28 Am. Dec. 521]. The evidence fails to show any unreasonable and unnecessary delay for which the defendant might have been held liable if any damage had been thus occasioned. But even if the delay were inexcusable, it was not the cause

of the loss. There was no relation of cause and effect between that delay and the destruction of the goods by the public enemy. The loss was consequential on the delay in no other sense than that of being merely subsequent in time. The goods arrived safely on the next day at Miller's Landing. No damage had been done by that delay. Then the act of the public enemy destroyed the property. It was this act that occasioned the loss. As to the delay, it was at most an injury without a damage; and as to the loss, it was a damage without an injury on the part of the defendant. It is a well-settled rule that the wrong-doer shall be held responsible only for the proximate and not for the remote consequences of his actions, and this maxim has been applied to cases of this kind: *Denny v. New York Central R. R. Co.*, 13 Gray, 481 [74 Am. Dec. 645]; *Morrison v. Davis*, 20 Pa. St. 171 [57 Am. Dec. 695].

It is the principle of the law of damages that they must be the natural and proximate consequence of the act complained of: Sedgwick on Damages, 65; 2 Greenl. Ev., secs. 254, 256; Angell on Common Carriers, sec. 201.

Though the act of God or of the public enemies be in itself alone a good defense, yet if the loss be directly brought about by reason of the negligence or want of proper care and foresight of the party himself, it would not excuse him. In such case, the negligence or want of reasonable care and foresight might be deemed the proximate cause of the damage: Broom's Legal Maxims, 105; 2 Greenl. Ev., sec. 219. And if it had been made to appear that the conductor knew of the immediate presence of the hostile forces, and had reason to believe that his train would go through safely on that day, but that there was danger that the train would be attacked and destroyed on the next day, and that he had for that reason left the plaintiff's goods behind, and taken other goods instead, to make sure of their safety, and had then without reasonable care and foresight proceeded with the plaintiff's goods on the next day in the face of the impending danger, there might have been some ground on which the defendant could be held liable: 2 Parsons on Contracts, 1st ed., 456. But on the case made here, we are clearly of the opinion that the defendant was not responsible.

We conclude, therefore, that there was no error in giving the defendant's instructions, and none in refusing those asked by the plaintiff.

Judgment affirmed.

The other judges concurred.

COMMON CARRIER, WHETHER LIABLE FOR LOSS OF GOODS OCCURRING THROUGH ACT OF GOD or the public enemy when such loss results from his negligence: See *Michaels v. New York Central R. R. Co.*, 86 Am. Dec. 415, note 426, where other cases are collected; *Read v. Spaulding*, 86 Id. 426, note 433.

Morgan and his band of Confederates constituted in May, 1862, public enemies, and a common carrier was not liable for money taken by them from his possession: *Bland v. Adams Ex. Co.*, 85 Am. Dec. 623.

A common carrier is liable for the natural, ordinary, and proximate consequences of his acts, but not for those that are remote and extraordinary: *Ballentine v. North Mo. R. R. Co.*, 40 Mo. 509; *Pruitt v. Hannibal & St. J. R. R. Co.*, 62 Id. 542, both citing the principal case.

RECOVERABLE DAMAGES ARE SUCH AS ARE DIRECT AND INCIDENTAL: See *Hamilton v. McPherson*, 84 Am. Dec. 330, note 333, where other cases are collected.

CHOUTEAU v. GODDIN.

[39 MISSOURI, 229.]

PRINTED CONDITIONS UPON WHICH SALE BY AUCTION PROCEEDS CANNOT BE VARIED or contradicted by parol evidence of the verbal statements of the auctioneer made at the time of the sale, except for the purpose of showing fraud. But parol evidence that is not repugnant to the printed terms of sale, but consistent with and explanatory of them, is admissible. Where, therefore, the wrecks of vessels lying in a river are sold by name as lying at certain localities, evidence is admissible to show that the materials were lying in the river at the localities named, and that the names were wrongly given, the wrecks being incapable of identification by their names, and being masses of rubbish rather than specific chattels.

WHERE PARTY BY WORDS OR ACTS INDUCES ANOTHER TO BELIEVE in the existence of a certain state of facts, and to act upon that belief so as to alter his condition, he will be estopped from alleging to the contrary against the party who has thus altered his condition.

ACT OF PART OWNER ACTING AS AGENT FOR ALL OWNERS CONCLUDES all the part owners.

ACTION for damages for the alleged wrongful taking and carrying away of certain property of the plaintiffs. The steamboats referred to in the opinion had belonged to the rebels, from whom they had been captured in the vicinity of Island No. 10. The other facts are stated in the opinion.

Grover and Sharp, and Ewing and Meier, for the appellants.

Cline and Jamison, for the respondents.

By Court, WAGNER, J. The record in this case presents two questions for our consideration: 1. Whether the evidence in regard to the manner in which the boats were sold was admissible; and 2. Whether the declarations and actions

of Goddin in pointing out the Grampus to respondents' agent, Carlin, and thereby inducing him to go to the labor and expense of reclaiming and saving the machinery, operated as an estoppel.

The boats were sold by Captain Wise, assistant quartermaster of the United States army, in pursuance of an advertisement which he had inserted in the St. Louis, Cincinnati, and Cairo newspapers. The notice stated that he would sell the "following named steamboats" (naming them) as they lay, and that payment would be required within ten days from the time of sale.

The boats were sold by name, but the auctioneer and others testify that at the time they were put up they were sold according to a description made by Colonel Bissell of the engineer regiment, who had made a survey of them, and given a written statement of their condition and locality. At this sale, Stephens, one of the appellants, bought the Grampus, and the respondents bought the Mohawk. The boats were in the river, about seven miles distant from each other; and subsequent information disclosed the fact that Bissell was mistaken in his report, and that the Mohawk occupied the position which he ascribed to the Grampus, and that the Grampus was situated where he had located the Mohawk. The boats were badly wrecked, and there were no names or *indicia* visible by which they could be certainly known or identified.

After the sale, Stevens conveyed part of his interest in the wrecked steamer to Goddin, who was also present at the sale; and Goddin and Carlin, the agent of respondents, went down the river for the purpose of wrecking the boats they had purchased. When opposite to where the Grampus lay (though supposed by the parties at that time to be the Mohawk), Goddin pointed to the boat, and told Carlin there was one of his boats. Carlin with his hands proceeded to take out the machinery, tackle, boilers, etc., belonging to the boat, and placed them on the bank of the river. Goddin, having ascertained from the inhabitants living in the vicinity that the boat on which Carlin was at work was the Grampus, claimed the property, and afterwards took and carried it away. It is insisted here that the printed notices were to sell the boats by name, and that the evidence that they were put up and sold according to their position in the river as described in Colonel Bissell's report and survey was wholly inadmissible, and should have been rejected by the court.

The printed conditions under which a sale by auction proceeds cannot be varied or contradicted by parol evidence of the verbal statements of the auctioneer made at the time of sale, without it be for the purpose of proving fraud: *Powell v. Edmunds*, 12 East, 7; *Shelton v. Livins*, 2 Crompt. & J. 411; *Highgate v. Archway Co.*, 5 Taunt. 792. But parol evidence that is not repugnant to the printed terms of sale, but is consistent with and explanatory of them, is admissible: *Cannon v. Mitchell*, 2 Desaus. Eq. 321; *Wainwright v. Read*, 1 Id. 573-582; *Lessee of Wright v. Deklyne*, 1 Pet. C. C. 204.

Had the printed notices referred to the steamboats afloat, or in such condition that their identity could have been easily ascertained, we do not think that parol evidence would have been admissible to have varied the terms; but it is doubtful whether the rule can be properly applied to this case, when the special circumstances are considered. The boats were wrecked and abandoned, their identification at the time of the sale was impossible, and they were rather to be taken as masses of rubbish than specific chattels. The notice was to sell the wrecks as they lay. There was nothing positively known as to the names of the boats, which lay in different places; but it was known that there were boats irrespective of names lying in certain designated localities. All was involved in uncertainty and doubt, and from the confusion arising from such a state of things, they were sold by their names as lying in certain positions. We are inclined to the opinion that the declarations were not repugnant to or inconsistent with the advertisements, but merely explanatory.

The next question is, Were the appellants estopped by the declarations of Goddin in pointing out the wreck to Carlin as respondents' property, and conniving at his preserving the machinery at great labor and expense? It may be said that any act or omission of a party unnatural or inconsistent with what he claims to be true may properly be weighed against him. And where a party by his acts or words causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous condition, he will be concluded from averring anything to the contrary against the party so altering his condition.

This court, in *Taylor v. Zepp*, 14 Mo. 482 [55 Am. Dec. 113], and *Newman v. Hook*, 37 Id. 207, adopted the language of Bronson, J., that to constitute an estoppel *in pais* as against a party, there must be, — 1. An admission inconsistent with the

evidence which he has to give in the title or claim which he proposes to set up; 2. An action by the other party upon such admission; 3. An injury to him by allowing the admission to be disproved.

The facts in this case come up to the full measure of the learned judge's definition. Goddin pointed the boat out to Carlin and informed him that that was his boat. Carlin acted on that admission; he expended the money of his employers in performing the duty intrusted to him; and to allow Goddin, in the face of his admission by which he induced Carlin to act, to come in with countervailing proof, would not only be inflicting an injury on the opposite party, but would be directly inconsistent with the admission which he had previously made, and on which the other party acted.

But it is said that although Goddin may be estopped, his admissions cannot affect his co-defendant, Stephens. One party, it is true, cannot generally prejudice the interest of another by making statements, unless the latter has in some manner assented to or ratified them. We know of no exception to this rule when the parties do not stand in some relation of privity. But here Goddin and Stephens were joint owners. Goddin represented both parties; he was acting as agent for the partnership in attempting to reclaim and preserve the partnership property, and any act or declaration made by him whilst carrying out the undertaking was admissible as a part of the principal transaction.

Had a trial of the right of property ensued when Goddin seized it on the river bank, and Goddin alone been a party to it on one side, the judgment would undoubtedly have bound Stephens whether he appeared as a party to the record or not; for it seems now to be well settled that a judgment against a servant or agent who defends a suit in right of his master or principal will be conclusive against a renewal of the controversy by the latter: *Heller v. Jones*, 4 Binn. 61; *Case v. Reeve*, 14 Johns. 79; *Castle v. Noyes*, 14 N. Y. 329; *Bailey v. Foster*, 9 Pick. 139; *Peterson v. Lothrop*, 34 Pa. St. 223; *Farnsworth v. Arnold*, 3 Sneed, 252. But the rule would not extend to the case of a part owner where no agency existed either express or implied; for the admissions of one part owner will not bind the other part owner unless he is constituted the agent of the others in and concerning the thing owned. The case, however, clearly shows an agency; Goddin and Stephens had a joint interest, and Goddin was acting for both.

The judgment must be affirmed.

The other judges concurred.

ESTOPPEL IN PAIS, WHAT IS, AND WHEN IT ARISES: See *Brown v. Bowen*, 86 Am. Dec. 406, note 414, where other cases are collected; *Plumer v. Lord*, 85 Id. 773, note 776; *Musselman v. McElhenny*, 85 Id. 445; *Davis v. Davis*, 85 Id. 157, note 171. Where a party by words or acts induces another to believe in the existence of a certain state of things, and to act upon that belief so as to alter his condition, he will be estopped from alleging to the contrary against the party who has thus altered his condition: *Campbell v. Johnson*, 44 Mo. 251; *Rice v. Bunce*, 49 Id. 235, both citing the principal case.

ADVERTISEMENT OF SALE BY AUCTION IS NO PART OF CONDITION of the sale, unless expressly made so: *Ashcom v. Smith*, 21 Am. Dec. 437.

THE PRINCIPAL CASE IS CITED in *Matson v. Calhoun*, 44 Mo. 370, to the point that mistake does not vest title.

STOUT v. BENOIST.

[89 MISSOURI, 277.]

ACCEPTOR OF FORGED BILL IS BOUND TO KNOW DRAWER'S HANDWRITING, and if he accepts the bill and pays it to a holder *bona fide* and for a valuable consideration, he cannot recover back the money.

WHERE TWO PERSONS ARE EQUALLY INNOCENT, AND ONE IS BOUND TO KNOW and act upon his knowledge, and the other has no means of knowledge, the latter will not be compelled to bear a loss for the purpose of exonerating the former.

APPEAL from St. Louis circuit court. The opinion states the case.

Sharp and Broadhead, for the appellants.

Hudgens and Son, for the respondent.

By Court, WAGNER, J. It appears from the record that on the twenty-third day of January, 1860, one William Morin deposited with the respondent, who was a banker in the city of St. Louis, three hundred dollars, and received a certificate therefor payable to the order of himself upon a return of the certificate properly indorsed. About the 4th or 5th of June in the same year, Morin was in St. Joseph, Missouri, and the certificate of deposit was stolen from him. On the 5th of June a stranger entered the office of the Buchanan Life and General Insurance Company, at St. Joseph, with the certificate, with the name of William Morin indorsed upon it, and represented himself to the secretary of the company as Morin, the depositor of the money, and desired the secretary to pay

him the amount of money called for in the certificate. The certificate had been stolen, and the indorsement forged. The person making the presentation being a stranger and unable to identify himself, the secretary refused to pay the money, but consented to receive it for collection; he accordingly indorsed it as secretary of the insurance company, and forwarded it by mail to the appellants, who were the correspondents and collecting agents for the insurance company at St. Louis. The certificate was received by the appellants on the morning of the 7th of June, and indorsed by them and presented to respondent at his banking house for payment, and the money paid. On the evening of the same day, the insurance company at St. Joseph paid the full amount to the person who left the certificate for collection, and who is supposed to have been the thief and the forger. The forgery was not discovered till the 17th of June, and afterwards this suit was brought against the appellants to recover back the money, on the ground that the original depositor's name had been forged, and that the subsequent indorsers had no property in the certificate. The court below decided in favor of the respondent, and from its judgment this appeal is prosecuted.

The only question between the parties is, Which shall bear the loss? They were both innocent, and in such a case, the sound rule of decision would seem to dictate that if the fault or negligence can be traced to either party, the loss should be fastened upon him.

The leading case bearing on this subject is *Price v. Neal*, 3 Burr. 1355. In that case, it appears from the statement there were two bills of exchange which had been paid by the drawee, the drawer's handwriting being a forgery. One of these bills had been paid when it became due, without acceptance; the other was duly accepted, and paid at maturity. Upon discovery of the fraud, the drawer brought an action against the holder to recover back the money so paid, both parties being admitted to be equally innocent. Lord Mansfield, on delivering the unanimous opinion of the king's bench, said: "It can never be thought unconscientious in the defendant to retain this money, when he had once received it on a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid without the least privity or suspicion of forgery. Here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted

or paid it, but it was not incumbent upon defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him, and he sends his servant to pay it and take it up. The other bill he actually accepts; after which acceptance, the defendant innocently and *bona fide* discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant."

Levy v. Bank of United States, 1 Binn. 27, was a case where one Thomas passed to the plaintiff a check upon the Bank of the United States for two thousand six hundred dollars, and purporting to be drawn by one Wharton in favor of Thomas or bearer. The check was presented at bank by Mr. Levy's (plaintiff's) clerk, and was entered by the receiving teller to Mr. Levy's credit, in his bank-book, as cash. It was also entered on the scratcher of the bank and in the cash-book, and was credited to Mr. Levy and charged to Wharton, according to the usage of the institution. On examining the checks of the bank the same day, the check was discovered to be a forgery; the credit to Levy in the cash-book of the bank and the charge to Wharton were respectively struck out, and a clerk of the bank was immediately sent to Levy to inform him of the fraudulent character of the check and demand a new one in lieu thereof, which he refused to give; and on suit instituted by Levy against the bank, it was held that the acceptor of a forged bill was bound to pay it, not upon the principle that his acceptance had given credit to the bill, but because it was his duty to know the drawer's handwriting, which he was precluded from disputing.

Gloucester Bank v. Salem Bank, 17 Mass. 33, is an authority for the same doctrine.

In *United States Bank v. Bank of Georgia*, 10 Wheat. 333, the whole question was examined by Mr. Justice Story with his usual redundant and exhaustive learning, and the doctrine of Mansfield received the unqualified approbation of the supreme court of the United States. And Professor Parsons, in

his recent valuable treatise (2 Parsons on Notes and Bills, 285), extracts the principle from the authorities that "bankers must always pay their acceptance on a forged draft, because they are bound to know the handwriting of their customers, and hence must bear the loss when the signature of the drawer is forged, and they have accepted. When both parties are innocent, and the loss must fall upon one, it should be upon the one who in law most essentially facilitated the fraud"; and in support of which he cites *Leach v. Buchanan*, 4 Esp. 226; *Forster v. Clements*, 2 Camp. 17; *Price v. Neal*, 3 Burr. 1354; *Wilkinson v. Johnson*, 3 Barn. & C. 428; *Easdale v. La Nauze*, 1 Younge & C. 394; *Hall v. Fuller*, 5 Barn. & C. 450; *United States Bank v. Bank of Georgia*, 10 Wheat. 333; *Smith v. Shepperd*, manuscript case cited in Chitty on Bills, 9th ed., 266.

Considerations of convenience and public policy imperatively demand and require this rule. Bankers have the means in their own hands, by acquiring an intimate knowledge of the signatures of their customers, of protecting and securing themselves against impositions and forgeries. They alone possess the means of knowing when paper is presented to them whether the signatures or indorsements are genuine. And if these means are not employed, it is evidence of a neglect of duty which the public have a right to require of them for its safety.

In a case where persons are equally innocent, and one is bound to know and act upon his knowledge, and the other has no means of knowledge, it would be inequitable and unjust to burden the latter with a loss for the purpose of exonerating the former.

The judgment is reversed.

The other judges concurred.

PAYMENT OF FORGED BILL, EFFECT OF: See *McCall v. Corning*, 48 Am. Dec. 454, note 462, where other cases are collected.

CARR v. YOUSE.

[89 MISSOURI, 344.]

WHEN WRIT OF EXECUTION ISSUED TO CORONER BECAUSE OF VACANCY IN OFFICE OF SHERIFF is turned over unexecuted to the new sheriff after he has been appointed and has qualified, he may make a valid levy and sale thereunder.

ACTION ESTABLISHING COURT OF COMMON PLEAS IN CITY OF HANNIBAL required transcript of justice's judgment to be filed in clerk's office both of the Marion circuit court and of the Hannibal court of common pleas before it should become a lien, and before an execution should be issued thereon by the clerk of the latter court.

CERTIFICATE OF JUSTICE OF PEACE THAT EXECUTION HAS BEEN ISSUED upon a judgment rendered by him, and has been returned *nulla bona*, is not admissible in evidence. The fact must appear from the certified copy of the execution and of the officer's return thereto.

EJECTMENT. The opinion states the case.

James Carr, for the appellant.

G. Turner, for the respondent.

By Court, HOLMES, J. This was an action of ejectment for a lot of land situate in the city of Hannibal, in the county of Marion. The plaintiff undertook to show title by virtue of a sheriff's sale and deed under an execution issued from the clerk's office of the Hannibal court of common pleas upon a transcript of judgment of a justice of the peace in the township of Mason, in said county, which had been filed in the office of said clerk. The execution was directed to the coroner, reciting that there was a vacancy in the office of sheriff; but before any levy had been made by the coroner, a new sheriff having been appointed, the execution had been turned over to the sheriff, and had been executed by him. The plaintiff offered in evidence his sheriff's deed, together with a certified transcript of the entries and proceedings before the justice as the same appears of record in his docket, not including, however, the execution issued by the justice and the constable's return thereon; and he also offered a paper purporting to be a certificate signed by the justice some two years afterwards certifying the fact that the execution issued in the case had been returned *nulla bona*, giving also the words of the return as signed by the constable.

The defendant objected to the admission of the sheriff's deed in evidence for the reasons, — 1. That it recited an exe-

cution directed to the coroner, and executed by the sheriff; and 2. That it did not show the fact that a transcript of the justice's judgment had been filed also in the clerk's office of the circuit court of the county of Marion. These objections were sustained and the deed was excluded.

Objection was made also to the admission of the certificate of the justice as to the fact that an execution had been issued by him and returned *nulla bona*; and the paper was excluded. No objection appears to have been made to the transcript from the justice's docket.

Thereupon the plaintiff submitted to a nonsuit, and brings the case up by appeal.

The first objection to the sheriff's deed was not well taken. It appeared on the face of the execution itself, as well as from the other evidence in the case, that at the time when the execution was issued and directed to the coroner there was a vacancy in the office of sheriff. In such case the execution must be directed to the coroner: Rev. Code 1855, p. 367, secs. 2, 3. When so directed, it is proper that the reason why it is so directed should be recited in the execution: *Moss v. Thompson*, 17 Mo. 405. It appears also that before the coroner had made a levy the new sheriff had entered upon the duties of his office, and the execution had been turned over to him, together with other unexecuted process in the hands of the coroner, and had been executed by the sheriff. We see no valid objection to this course of proceeding. The statute expressly authorizes the coroner, when there is a vacancy in the office of sheriff, to perform all the duties which are by law required to be performed by the sheriff until another sheriff shall be appointed and qualified: *Id.*, sec. 3.

It may be taken as fairly implied that when the vacancy in the office of sheriff shall have been filled, the function of the coroner in respect of these duties of the sheriff shall cease, and that all unexecuted process is to be turned over to the sheriff. Nothing is expressly said upon the subject in the statute; but the analogy of the provision respecting the duties of sheriff in a similar case, as well as the reason of the thing, would seem to argue that such must be the proper course: *Dunnica v. Coy*, 28 Mo. 525 [75 Am. Dec. 133]. In *Duncan v. Matney*, 29 Id. 368 [77 Am. Dec. 575], when the former sheriff had made a levy and advertised the property for sale under the execution, and his successor had completed the execution

of the process by making the sale, it was said that the successor was bound to adopt the acts of his predecessor, so far as regular and legal, without subjecting the defendant to the cost of another levy and advertisement.

This reasoning applies with equal force in the present case. What need of incurring the delay and expense of returning the execution and suing out another directed to the sheriff? Nor is any authority shown which would authorize the coroner to proceed with the execution of the process when not already begun after the appointment of a new sheriff.

The power and authority of the sheriff were as extensive as those of the coroner with respect to the execution of process; and the writ having been executed by the sheriff in conformity to law, no ground is perceived in this respect on which the sale made by him can be declared invalid. We think there was nothing in this objection.

The second objection appears to have been well grounded. The deed did not recite, nor was there any evidence offered to prove, that the transcript of the justice's judgment had been filed in the office of the clerk of the circuit court of Marion County.

The general statute required this to be done before the judgment could become a lien upon real estate within the county: Rev. Code 1855, p. 961, secs. 16, 17. The latter act, amendatory to an act establishing the court of common pleas in the city of Hannibal (Laws of 1851, p. 208, sec. 3), provided "that transcripts of judgments rendered by justices of the peace in Mason township, in the county of Marion, shall be filed with the clerk of the said court of common pleas, as well as with the clerk of the Marion circuit court, in the same manner and with the same effect as they are now filed with the clerks of the circuit courts, but that executions shall issue solely from the said court of common pleas."

The purport of this provision would seem to be that the transcript of a justice's judgment rendered in Mason township (within which the city of Hannibal was situated) should be filed in the clerk's office both of the Marion circuit court and of the Hannibal court of common pleas before the judgment should become a lien, and before an execution should be issued thereon by the clerk of the latter court.

The reason of this enactment may be found in the consideration that Mason township was but a small part of the county,

and that the office of recorder of deeds, and nearly all the records of the county affecting the title to real estate, were located at the county seat, where it would be necessary for all persons to go for the examination of titles to real estate within the county; and it may very well have been the intention of the legislature to require the transcript to be filed there also for the purpose of notice, since it was to have the effect of being a lien when filed upon real estate throughout the county. It may be true that the records of the Hannibal court of common pleas would also impart notice to all persons concerned. Nevertheless there would seem to be good reason for requiring such notice in both places. Such is the obvious and direct purport, and such (as we think) the manifest intent, of the statute, though it might be possible to find another and a forced construction.

It must follow that the filing of the transcript also in the clerk's office of the Marion circuit court was a condition precedent to the judgment being a lien on real estate, and a condition precedent to the authority of the clerk of the Hannibal court of common pleas to issue an execution thereon; and consequently, that this execution, being issued without authority of law, was null and void.

A like construction has been given to a provision of the general statute, expressed in similar terms, to the effect that "no execution shall be sued out of the court where the transcript is filed until an execution shall have been issued by the justice and been returned *nulla bona*; and it has been held that the existence of such execution and return before the issuing of execution by the clerk is a condition precedent to the validity of the execution, or of the title to be acquired at the sale, and that such fact must be proved either by the record of the clerk's office or by that of the justice, or otherwise the execution must be held void: *Coonce v. Munday*, 3 Mo. 374; *Burk v. Flurnoy*, 4 Id. 116. It has been strongly intimated, too, that the evidence of this fact should properly be filed in the clerk's office where the transcript is filed before an execution should be sued out, and that it was the evident intention of the legislature that the evidence of the authority to issue the execution should be made a matter of record in the clerk's office; but it was not decided that the executions would be void if a transcript of the justice's execution and constable's return thereon was not actually so filed: *Murray v. Laf*

ten, 15 Id. 621. In that case it appeared by the transcript filed in the clerk's office that an execution had been issued and so returned, and the justice himself was not allowed to prove by parol that such had not been the actual fact.

In this case, it is attempted to prove this fact, not by any certified transcript of the record from the office of the clerk of the court, nor even by a certified transcript of the execution and constable's return thereon from the office of the justice, but by a transcript of the justice's docket itself, together with a mere certificate in writing, under the hand of the justice, certifying the fact that an execution had been issued by him, and had been returned *nulla bona*, giving also the words of the return.

This evidence was clearly inadmissible. It is the transcript filed in the clerk's office, and which is to be recorded there in a book to be kept for that purpose by the clerk, that is the evidence of the lien, and is the foundation of the execution to be issued to enforce that lien; and a certified copy of this record is the proper evidence of authority to issue the execution. If such record of the clerk's office does not contain the justice's execution and the return thereon made, then (it seems) such execution and return may be proved by the record of the justice, *Coonce v. Munday, supra*, or a certified transcript of the same; but it was distinctly declared in *Murray v. Laften, supra*, that this fact could not be proved by the parol testimony of the justice. His certificate in writing is no better evidence than his testimony as a witness would be, nor so good, for a witness on the stand could be cross-examined. Here the justice is not even called as a witness, but his certificate in writing is offered as evidence to prove these facts. Better evidence might have been procured, namely, a certified transcript of the execution and return. We are not aware of any principle of law on which this certificate could be held to be admissible evidence against the objections of the other party. If it had been admitted without objection or exception, all objections might have been considered as waived, and then it might have been held sufficient. Here objection was made and sustained. We think the paper was rightly excluded.

On this evidence offered by the plaintiff, we think there was no error in excluding his sheriff's deed.

Judgment affirmed.

The other judges concurred.

Motion for rehearing filed, taken under advisement, and overruled at March term, 1867.

CORONER, WHEN PROCESS SHOULD BE ISSUED TO: See *Oliphant v. Dallas*, 65 Am. Dec. 146, note 147, where other cases are collected.

THE PRINCIPAL CASE WAS REAFFIRMED in 43 Mo. 20; it was distinguished in *Burke v. Miller*, 46 Id. 261; and it was cited in *Waddell v. Williams*, 50 Id. 223, as holding that the mere certificate of a justice of the peace that an execution had been issued and returned *nulla bona* was not sufficient.

CASES
IN THE
SUPREME COURT
OF
NEVADA.

COX v. SMITH.

[1 NEVADA, 161.]

COMPOUND INTEREST IS NOT SANCTIONED by the Nevada act "in relation to money of account and interest."

CONTRACTS FOR FUTURE COMPOUND INTEREST WILL NOT BE ENFORCED IN EQUITY, nor, it seems, at law.

NOTE IS VALID AS FOUNDED ON SUFFICIENT CONSIDERATION where, for a loan of fifteen hundred dollars in gold coin, made at a time when that amount of gold would be worth two thousand five hundred dollars in paper currency, the note was executed for two thousand five hundred dollars, without specifying in what kind of money it was payable.

NOTE BEARS INTEREST AFTER MATURITY AT RATE STIPULATED, where it provides that interest shall continue to run on the principal sum until paid.

MORTGAGOR'S AGREEMENT TO PAY COUNSEL FEE IF SUIT IS BROUGHT WILL BE ENFORCED, if reasonable, by a court of equity; and that will be deemed reasonable for which the parties themselves have contracted, if it is not so extravagant as to show that it was intended as a penalty to be held *in terrorem* over the mortgagor.

SUIT to foreclose a mortgage. The facts are stated in the opinion.

R. W. Clarke, for Cox.

Atwater and Flandreau, for Smith and Garrett.

By Court, **BEATTY, J.** In August, 1863, Robert Logan and Wellington Stewart executed to plaintiff the following note:—

"CARSON CITY, NEVADA TERRITORY,
August 25, 1863.

"\$2,500.

"For value received, we, or either of us, promise to pay E. R. Cox or order, in twelve months from date, without grace,

the sum of twenty-five hundred dollars (\$2,500), with interest thereon at the rate of six (6) per cent per month, payable monthly in advance on that day of each and every month corresponding with the date of this obligation, until paid; and if any part of the interest herein provided shall not be paid when the same becomes due, then the holder hereof may add the same to the principal sum, and it shall thereupon become a part of said principal, and bear monthly interest at the same rate, and so on from month to month, adding all interest in arrear to such principal, and compounding interest on interest at the same rate, and making monthly rests on that day of each month corresponding to the date of this obligation; and in case a cause of action shall accrue on this obligation, and the payee or holder hereof shall commence a suit to enforce the same, then it shall be lawful for the said payee or the holder hereof to have and demand upon the same ten (10) per cent upon the amount which shall be recovered thereon as a reasonable indemnity for attorney and counsel fees, in addition to the taxable costs of suit; and in case of judgment or decree, said percentage shall be included therein, and bear interest at the same rate and in the same manner as the principal debt.

“ROBERT LOGAN,
“WELL. STEWART.”

This note was secured by a mortgage on certain real estate. In March, 1864, Wellington Stewart executed several notes to Robert Logan, and to secure the payment of the same, executed a mortgage on certain real and personal property.

The most valuable part of the property embraced in the mortgage from Stewart to Logan was also embraced in the joint mortgage of Stewart and Logan to Cox; so that Logan, as to the principal part of his security, stood in the position of second mortgagee. Logan assigned his notes and mortgage to J. E. Garrett and T. G. Smith.

The property mortgaged is insufficient to pay all the encumbrances, and the controversy in the case is between the first mortgagee, E. R. Cox, and Garrett and Smith, who are the successors in interest to the second mortgagee. When Cox took the note which is set out in the beginning of this opinion, he advanced or loaned to Stewart and Logan only fifteen hundred dollars in gold coin, but that fifteen hundred dollars was worth, and would have purchased in currency, the sum of two thousand five hundred dollars. There was a verbal agreement made when the note was executed that fifteen hundred

dollars in gold coin would be accepted if offered in lieu of the two thousand five hundred dollars.

Upon the foreclosure of the mortgage, the parties holding the second mortgage raised these points: 1. The plaintiff was not under our statutes entitled to compound interest on his claim; 2. He could only recover the actual amount loaned, fifteen hundred dollars and interest; 3. The demand after maturity only bore interest at ten per cent per annum; 4. The counsel fee as stipulated in the note was exorbitant, and would not be enforced in a court of equity,—but only an allowance of a reasonable counsel fee.

The court below held with the second mortgagees as to the first point, only allowing simple interest. On the other three points, the court held with the first mortgagee. Both parties appeal: the plaintiff from that part of the decree adopting simple interest as the rule of computation, and refusing compound interest; Garrett and Smith from those portions of the decree having reference to the other three points just mentioned. We shall first examine the point raised by plaintiff's appeal.

In the statutes of California, from which ours have generally been copied, two acts are to be found, one entitled "An act in relation to the money of accounts of this state"; the other entitled "An act to regulate the interest of money." In our statutes, these two acts have been blended into one, entitled "An act in relation to money of account and interest."

Sections 1, 2, and 3 of our act are in the same language precisely as the three sections of the first-named California act, with the exception of the word "territory" is substituted for "state" in the first section. The phraseology of both statutes are in some particulars a little peculiar, and it is evident ours was copied from the California act. The fourth section of our act, which fixes the legal rate of interest (in the absence of an express written contract), is identical with the first section of the second-named California act, with the exception of two words. Our statute contains the word "or" in one part of a sentence where it ought not to be. This is evidently a mistake in the printer or some copyist, but does not in the slightest degree alter or obscure the meaning of the sentence. The word "territory" is substituted for "state." This section is evidently copied from the California statute.

The fifth and last section of the Nevada act is in these words:—

"Sec. 5. Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract. Any judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment, provided only the amount of the original claim or demand shall draw interest after judgment."

This fifth section is an exact copy of the second section of the last-named California act down to the proviso. Nothing like the proviso is found in the California act.

Whilst our act ends with this proviso to the fifth section (second of the California act), the California act from which it is copied contains a third section, which is in these words: "Sec. 3. The parties may, in any contract in writing whereby any debt is secured to be paid, agree that if the interest on such debt is not punctually paid it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt."

The copying of two sections of the California act and omitting the other indicates that the omission was made *ex industria*, and for a purpose. The journals of the legislative assembly show, too, that this third section of the California act was at one stage of the proceedings before that body embraced in the bill and afterwards stricken out.

To our mind, this is conclusive that the legislature did not intend by their action to sanction or encourage compound interest. In the proviso above referred to they expressly prohibit compound interest in judgments.

If we are correct in the foregoing views as to the effect and proper construction of our statute, the only remaining ground on which the plaintiff can claim to support his theory is, that the legislature failing to sanction compound interest by express enactment cannot operate as a prohibition, but leaves the question just where it stood at common law. It may not, then, be improper to inquire what was the rule of common law. We find that there is great contrariety of opinion as to what was the rule of the common law before the statute of 37 Henry VIII. According to the opinion of some authors, all interest on money was usurious and unlawful before that time. On the other hand, Chief Justice Hale held that the common law only prohibited as usurious and unlawful interest which amounted to forty per cent per annum or more.

On this subject, Bacon's Abridgment, title Usury, may be

consulted by those who are curious as to the ancient law. Also the opinion of Senator Spencer in the case of *Rensselaer Glass Factory v. Reid*, 5 Cow. 609. Perhaps the discrepancies of opinion on this subject may be accounted for in this way: At an early period in England the chancellors were generally churchmen, and not lawyers. As the Catholic Church has always set its face against usury, and been disposed to condemn the practice of exacting interest as immoral, and more especially as the Jews at that early day were almost the only money-lenders, it is probable that the chancellors held all interest usurious and illegal; whilst the common-law courts, presided over by lawyers, better acquainted with the commercial necessities of the country, and less prejudiced against the Jews, may have held that reasonable interest was not unlawful.

It is more profitable, however, to inquire what was the state of the law on this subject as established by the courts of equity and common law at the time our statute was passed. In 1 Am. Lead. Cas. 533, 534, the principal American cases on the subject of compound interest have been cited and commented on.

The general conclusion at which the author arrives is, that the "better opinion is that at law such an agreement, made either at or after the time of the original contract, will be enforced." In support of this proposition, the commentator cites several cases. On the other hand, on the same page, a large number of cases are cited holding an opposite doctrine. In chancery, this commentator admits the rule has been different, and courts of equity have uniformly discountenanced all attempts to collect compound interest, except in those cases where the contract to pay the same was made after the simple interest fell due.

So far as the reports referred to were accessible to us, we have only found two cases where actions at law have been sustained on a contract for payment of compound interest, with the exception of cases where the agreement to pay the compound interest was made after the simple interest became due. One of these cases was *Greenleaf v. Kellogg*, 2 Mass. 568, afterwards overruled in *Hastings v. Wiswall*, 8 Id. 455, and *Henry v. Flagg*, 13 Met. 65. The other case is *Talliaferro's Ex'rs v. King's Adm'r*, 9 Dana, 331 [35 Am. Dec. 140].

The New York, English, and Massachusetts decisions (except the one overruled case in Massachusetts) seem to be all the other way.

The opinion of Chancellor Kent in *State v. Jackson*, 1 Johns. Ch. 13, against the policy of allowing compound interest is, we think, exhaustive of the subject, and settles conclusively what is the rule of equity.

Then, when the Nevada statute was passed, it was the settled rule of courts of equity to refuse to allow compound interest when their aid was invoked to collect a debt. In courts of law the rule was not so well settled, but we think a majority of the states of this Union, and the English courts of law, had refused to enforce that portion of contracts which provided for the collection of compound interest.

None of these rulings were founded on the statutes against usury, but the general principles of the common law as it existed, without reference to the usury law. Our conclusion, then, is, that the court below did not err in refusing to allow compound interest, and the judgment of that court as to the part thereof appealed from by the plaintiff must be affirmed.

Having disposed of the plaintiff's appeal, we will now consider those portions of the decree from which defendants appeal. The first objection on the part of defendants to the decree is, that plaintiff is allowed to recover two thousand five hundred dollars, when he only loaned fifteen hundred dollars. The loan was made in coin, and it is admitted the fifteen hundred dollars would have purchased two thousand five hundred dollars in government currency. If the plaintiff had bought two thousand five hundred dollars with his fifteen hundred dollars in gold, and loaned the two thousand five hundred dollars in paper, no one would have claimed that the note for two thousand five hundred dollars was not a valid note, founded on a good and sufficient consideration.

Why, then, is it less adequate when the borrower gets that for which he could have purchased or procured twenty-five hundred dollars? The courts must recognize the fact that there are two kinds of currency, of unequal value, and they must presume that a debtor will pay in that kind of currency which is least onerous to himself. Therefore when a man borrows the more valuable kind of currency, and gives his note for a larger sum, payable in dollars, generally the presumption is he intends to pay in those dollars which are least valuable. We can see nothing illegal or immoral in such a transaction. If there is nothing morally wrong in the transaction, on what principle can it be claimed that a part of the

note is not recoverable? It cannot be said that such a note is without consideration, or that there has been any failure of consideration. The party borrowing has received all he expected to receive, all he contracted to receive, and has received that which in value was equal to two thousand five hundred dollars in currency.

The court will presume he did not intend to pay it in any better money than currency, and that it could not be enforced in any other kind of money.

We therefore hold that the court below ruled correctly in allowing the plaintiff to recover to the amount of two thousand five hundred dollars and interest.

Before leaving this branch of the case, we will say no question as to the constitutionality of the act of Congress making treasury notes a legal tender for debts was raised.

We therefore have not examined that question in connection with the subject, but assumed the law to be constitutional.

But even if it were otherwise, we cannot see that it would vary our decision on this point. If we had a uniform metallic currency, and a borrower were on the receipt of fifteen hundred dollars to give his note for two thousand five hundred dollars, payable one month after date, we do not see on what principle the court could relieve him from the note, if there was no fraud or mistake or imposition in the transaction.

The next ground of complaint on the part of defendants is, that the plaintiff is allowed to recover six per cent per month on his demand after the note fell due. It is contended that our statute only allows parties to contract for stipulated rates of interest during such time as the contract is unbroken. That upon the breach of the contract the law steps in and fixes arbitrarily what shall be the measure of damages for the breach of the contract, and that measure is interest at the rate of ten per cent per annum. The rule is well established that in actions for the breach of a contract for the payment of money, the measure of damages shall be the legal interest on the money for the time it is withheld, and no special damage can be proven or shown. But what is the legal rate of interest under our statute? If the contract is in writing, whatever rate of interest is established by that contract is the legal rate so far as that controversy is concerned.

The law allows the parties themselves, by due formalities, to fix the legal rate. The law provides that when the judg-

ment is entered up the debt shall bear that rate of interest which the parties have contracted shall be the legal rate for that particular transaction. It is what the parties have agreed is the value of the use of the money before breach. It is the interest or damages which the law gives after judgment. It would be strange if between breach and judgment the measure of interest or damages should be different.

It seems to us the intention of the legislature was clear that parties might contract for any rate of simple interest (but not compound), and that interest should continue to run on the principal sum until paid.

The parties have contracted it should so run in this case, and we can see no principle of law upon which they can escape their contract. The principle claimed is, that they can escape the consequences of a contract (which the law allows them to make) by refusing to comply, and throwing obstacles in the way of a prompt judgment. No doubt the law might prohibit the collection of a greater rate of interest than ten per cent on a debt past due. But we think the Nevada legislature neither did nor intended anything of the kind. Upon this point we think the judgment of the court below correct.

The only remaining question is as to the allowance of \$505 for counsel fee. On this point we feel some embarrassment in coming to a conclusion. We are satisfied that the amount is more than a reasonable fee for the foreclosure of the mortgage. But the amount is clearly fixed by the agreement of the parties, and we cannot say it is so unreasonably large, so extravagant in amount, as to induce a court of chancery to disregard the plain meaning and intent of the parties. We doubt extremely the policy of enforcing any contract whereby the mortgagor makes himself responsible for counsel fees.

We think it has a tendency to encourage extortionate and oppressive contracts, and is at war with the best interests of society. But all the cases we find reported on this subject hold that a reasonable counsel fee may be contracted for in such cases, and a court of equity will enforce the agreement.

In all the cases called to our attention in which this point has arisen, the courts have allowed the counsel fee charged, but have generally used some expression indicating that the charges allowed were reasonable, and that if unreasonable counsel fees were allowed, the court would interpose its authority to protect the mortgagor.

No rules, however, as to what are reasonable fees and what

are not are established. All that is said about reasonable fees amounts to mere *dicta* or surmises.

In this case, the counsel fee is certainly very liberal, to say the least of it, but not more extravagant than the rate of interest contracted for. Not finding any adjudicated cases authorizing such interference, and the amount not being so extravagant as to show that it was intended as a penalty to be held *in terrorem* over the mortgagor, this court will not interfere with the judgment of the court below.

The judgment of the court below is in all things affirmed. Each party will pay their own costs.

COMPOUND INTEREST, WHEN ALLOWED: See note to *Hart v. Dorman*, 80 Am. Dec. 290, where the question is discussed; note to *Davis v. Garr*, 55 Id. 397; *Mason v. Callender*, 72 Id. 102; *Hale v. Hale*, 78 Id. 490.

NOTE BEARS INTEREST AFTER MATURITY AT RATE STIPULATED: *Kohler v. Smith*, 56 Am. Dec. 369, and note; *Phinney v. Baldwin*, 61 Id. 62; *Brewster v. Wakefield*, 69 Id. 343, and note; *Mason v. Callender*, 72 Id. 102.

THE PRINCIPAL CASE IS CITED IN *McLane v. Abrams*, 2 Nev. 207, 208, to the point that it is competent for parties to stipulate in a mortgage that a certain sum or percentage shall be allowed the mortgagees for attorneys' fees or expenses in case of suit, but this sum must be reasonable.

MALLETT v. UNCLE SAM GOLD AND SILVER MINING COMPANY.

[1 NEVADA, 188.]

OFFICERS ARE OFFICERS DE FACTO, AND THEIR ACTS AS TO THIRD PERSONS ARE VALID, where, although their appointment by the selectmen of a county was without authority, they were commissioned by the governor of the territory, who was authorized to issue commissions to such officers, and they discharged the duties of their offices, and were generally recognized as legally constituted officers.

FACTS NECESSARY TO CONFER JURISDICTION MUST BE AFFIRMATIVELY SHOWN where any rights are claimed under or by virtue of the judgment of a court of special and limited jurisdiction.

SUMMONS MUST BE AFFIRMATIVELY SHOWN TO HAVE BEEN SERVED UPON DEFENDANT WITHIN TERRITORIAL JURISDICTION OF JUSTICE before a judgment by default founded thereon can be introduced in evidence to establish rights claimed to be acquired under it.

MERE NAKED TRESPASSER CANNOT SHOW OUTSTANDING TITLE IN EJECTMENT as against one claiming by virtue of prior possession; but such trespasser can show that the plaintiff, or those from whom he derives title, has parted with his right of possession by conveyance, or lost it by abandonment.

MINING LAWS OF DISTRICT WHERE MINE IS LOCATED WILL GOVERN in the location and working of mines; and when such laws directly point out

how mining claims must be located, and how the possession once acquired is to be maintained, that course must be strictly pursued.

TITLE PRESUMED BY COURTS IN FIRST APPROPRIATOR OF MINING CLAIM can only be a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired.

MINER LOCATING CLAIM, IT SEEMS, WOULD HOLD ONLY BY ACTUAL OCCUPANCY, and by such work for the development of the mine as would under all the circumstances be deemed reasonable, and his right of possession would only be continued by occupancy and use, where there is an absence of mining laws, and where the miner's right rests solely upon his possession.

ABANDONMENT OF PROPERTY, STRICTLY SPEAKING, IS NOT POSSIBLE without an intention to do so.

LAPSE OF TIME IS CIRCUMSTANCE, WHEN CONNECTED WITH OTHERS, TO PROVE INTENTION TO ABANDON, although bare lapse of time, short of the statute of limitations, and unaccompanied by other circumstances, will at law be no evidence of abandonment.

POSSESSION OF ONE PARTNER OR TENANT IN COMMON INURES TO BENEFIT OF ALL until such possession becomes adverse.

ACTION to recover certain mining ground. The facts are stated in the opinion.

Thomas Sunderland, Quint and Hardy, and J. H. Harmon, for the appellant.

J. S. Pitzer and C. J. Lansing, for the respondents.

By Court, LEWIS, C. J. This action is brought to recover one hundred feet, undivided, in that certain mining ground located in the county of Storey, and now occupied and claimed by the defendants, the Uncle Sam and Baltic Gold and Silver Mining companies. The plaintiff alleges in his complaint that on the sixteenth day of November, A. D. 1863, he was the owner as tenant in common, in the possession, and entitled to the possession of one hundred feet, undivided, in the Uncle Sam and Baltic Gold and Silver Mining companies; that said claim at the time of its location was three thousand feet in extent; that after the location thereof by the grantors of plaintiff and others, it was divided between the two companies, defendants in this action, the Uncle Sam taking the north twelve hundred feet and the Baltic taking the south eighteen hundred feet; that plaintiff, his grantors and co-owners in said claim, owned and were possessed thereof by virtue of their location and appropriation of the same on the twelfth day of March, A. D. 1860; that he by himself and his grantors remained in possession of said undivided one hundred feet of ground as tenants in common with his co-owners until the ouster complained of. It is further alleged that on the sixteenth day of November, A. D.

1863, the defendants, by their agents, servants, and employees, wrongfully and unlawfully entered upon said claim and ousted plaintiff therefrom, and that they unlawfully and wrongfully withhold the same from him. The answer specifically denies each and every allegation of the complaint, but admits that defendants are in possession of the premises, alleging title and right of possession in themselves, and that neither the plaintiff nor his grantors have been seised or possessed of the premises within two years next preceding the commencement of this action; and that they and those under whom they claim title have been in the quiet and peaceable possession thereof for more than two years before the bringing of this suit; that long before the commencement of this action plaintiff and his grantors abandoned whatever right, title, and interest he or they may have had in the claim aforesaid. The facts outside of the pleadings as developed by the record are substantially as follows:—

In March, A. D. 1860, the mining claim now occupied by the defendants was located by Charles Phillippi, Petro Anisini, and thirteen others; that these persons, or some of them, occupied and worked the claims thus located up to the ninth day of March, A. D. 1861, at which time the entire claim was sold under execution issued out of a justice's court against the owners thereof to one H. W. Johnson, to whom the constable making the sale executed a deed of the premises so sold, and placed him in the possession of the entire claim. A large number of the claimants thus ejected, availing themselves of an offer made by Johnson, redeemed their respective interests, and were admitted to all their original rights in the claim with him. From Johnson and the persons who thus redeemed their interests the present defendants derive their title. Phillippi and Anisini, the locators from whom the plaintiff claims his title, did not redeem their interests; whether they offered to do so or not is matter of no consequence in this action, if the view we take of their rights and liabilities be correct.

At the trial, the defendants, for the purpose of showing title and right of possession in themselves, offered in evidence the complaint, summons, return, judgment, execution, evidence of the sale, and the constable's deed by which Johnson became possessed of the claim; the docket of the justice by whom the judgment was rendered was also offered, for the purpose of showing the proceedings had in the action against Phillippi and others, and in which the judgment was rendered. To all

of which the plaintiff's counsel objected, urging various reasons in support of the objection, among which are: that the return of the officer does not show that the defendants in that action were served with process within the jurisdiction of the justice, and that the justice rendering the judgment, and constable who served the process, were neither officers *de facto* nor *de jure*, and that therefore the judgment is void, and defendants could therefore obtain no right under it. We do not deem it necessary to notice any of the other objections interposed.

The court below ruled out all the proceedings had before the justice, together with the constable's deed to Johnson, upon the ground that the judgment was a nullity, and therefore the defendants acquired no rights under it.

The defendants then offered in evidence several deeds from Phillippi to McMahon, Swift, and others, conveying all his interest in the Uncle Sam company, and all bearing date prior to the time of the execution of this deed to Small, the grantor of plaintiff, for the purpose of showing that at the time of the making of his deed to Small, Phillippi had no interest whatever in the ground in controversy, and that Small and the plaintiff Mallett received nothing by such conveyance. The books of the old Uncle Sam company were also offered for the same purpose, all of which were admitted by the court below, but were afterwards stricken out, and the jury instructed to disregard them, for the reason, as it appears by the instructions of the court, that the defendants, being mere naked trespassers, were not in a position to show outstanding title to defeat plaintiff's claims.

These rulings of the court—the giving of the instructions asked by plaintiff, and refusal to give instructions asked by defendants—are assigned as error by appellants; and as the record in this case presents numerous questions involved in other cases against the same defendants, it will perhaps be a matter of utility to pass upon all such as may be deemed of importance in the determination of the others.

The first question presented for our consideration is that raised upon the ruling of the court in rejecting the docket of the justice and the proceedings had before him. It appears from the testimony that Smith, the justice, and Reese, the constable, were not regularly elected to their respective positions, but were appointed by the selectmen of the county of Carson, and received their commissions from the governor. It

is conceded that the appointment by the selectmen was an assumption of power not warranted by the statutes of Utah; but it is claimed that having been commissioned by the power authorized to issue commissions to such officers, and having acted in their respective capacities, they were officers *de facto*, and that therefore their acts as to third persons are valid, and their proceedings legal. Smith and Reese discharged the functions of justice and constable for the county of Carson, and seem to have been generally recognized as legally constituted officers. It may often be a matter of extreme difficulty to determine whether a person discharging the duties of an office is to be deemed a mere intruder or an officer *de facto*; but a stronger case in favor of clothing such persons with official character, and giving validity to their acts, could scarcely be presented than the one at bar. Indeed, whenever a person so discharging the duties of an office is not a mere usurper of his position, the reason and spirit of all the authorities incline to support him as an officer *de facto*, and to sustain and give validity to his acts.

It is said that on the one hand he is distinguished from a mere usurper of an office, and on the other from an officer *de jure*. The rule is dictated by the most obvious necessity. If the acts of public officers could at any time be overthrown by the showing of some irregularity or informality in their elections or appointment, all confidence in the judgment of courts would be destroyed, and judicial proceedings would ever be involved in doubt and uncertainty.

In the case of *People v. White*, 24 Wend. 539, this question is fully argued by the learned chancellor, who says:—

“An officer *de facto* is one who comes into a legal and constitutional office by color of a legal appointment or election to that office; and as the duties of the office must be discharged by some one for the benefit of the public, the law does not require third persons, at their peril, to ascertain whether such officer has been properly elected or appointed before they submit themselves to this authority, or call upon him to perform official acts which it is necessary he should perform.”

Sutherland, J., in the case of *Wilcox v. Smith*, 5 Wend. 231 [21 Am. Dec. 213], uses the following language:—

“There must be some color of an election or appointment, or an exercise of the office, and an acquiescence on the part of the public for a length of time which would afford a strong presumption of at least a colorable election or appointment.”

Viewing the position of the justice and constable in this case in the light of the authorities, they must be considered officers *de facto*, and their acts as to third persons be held valid.

But a more serious objection to the introduction of the judgment, and the subsequent proceedings thereon, arises from the failure to show that the justice had jurisdiction of the persons against whom the judgment was rendered.

It nowhere appears that the summons in that case was served within the territorial jurisdiction of the justice, nor that any of the defendants appeared, either personally or by counsel. This objection, independent of the others argued, was sufficient to authorize the judge below in excluding all the proceedings had before the justice. By the laws of Utah, the jurisdiction of justices of the peace extended to the limits of their respective counties only. That service of a summons out of the county in which he had jurisdiction would be a nullity, there can scarcely be a doubt. A summons so served would have no more force or effect than if it were served out of the territory itself. If it were shown affirmatively that the summons was not served within the limits of Carson County, and that the defendants did not appear, no doubt can be entertained that the proceedings based upon such a service would be *coram non judice*, and void. No rule of law is more firmly established, or more generally recognized, than when any rights are claimed under or by virtue of the judgment of a court of special and limited jurisdiction, all the facts necessary to confer jurisdiction must be affirmatively shown: 2 Cowen and Hill's Notes to Phillips on Evidence, 906; *Barnes v. Harris* (opinion of Bronson), 4 N. Y. 374; *Bowman v. Russ*, 6 Cow. 233; *Smith v. Andrews*, 6 Cal. 654; *Swain v. Chase*, 12 Id. 283; *Lowe v. Alexander*, 15 Id. 296.

Jurisdiction in superior courts is presumed until the contrary appear, but nothing is presumed in favor of the jurisdiction of inferior courts.

The rule, *Omnia præsumentur rite esse acta*, has no application to the facts giving jurisdiction to such courts. In *Sollers v. Lawrence*, Willes, 416, the court, in speaking of courts of limited jurisdiction, says: "The rule is, that nothing must be intended in favor of their jurisdiction, but that it must appear by what is set forth in the record that they had such jurisdiction. The fact of the summons having been served upon the defendants would not necessarily bring them within the juris-

diction of the court; there must not only be a service, but there must be such service as will give the court jurisdiction. If a service out of the county would give no jurisdiction, the necessity of showing that it was had within the county is certainly as imperious as it is to show that service was had at all. It is claimed, however, by counsel that because the constable states in his return that some of the defendants were not to be found within his county, therefore the presumption is that those upon whom he obtained service were within the county; but the very acknowledgment that such a presumption is necessary is itself a confession of the insufficiency of the return. The rule is inflexible that no such presumption can be entertained. Though the judgment and proceedings under it were properly rejected when offered for the purpose of showing title in defendants, yet whether it should have been admitted when offered merely to show that the defendants were not mere naked trespassers is a question which it is scarcely necessary to pass upon in this case, as we think it perfectly competent for the defendants to have shown the outstanding title derived from Phillippi, independent of whether they were trespassers or not.

The court below erred in ruling out the deeds from Phillippi to McMahon, Swift, and others. If these deeds established the fact that at the time of the conveyance to Small Phillippi had no interest in the premises or claim in question to convey, Small got nothing, and could convey nothing to the plaintiff. If the defendants were not allowed to show such a state of things, we should have the novel case of a plaintiff having no title, and never having been in possession, recovering a mining claim from one in the actual occupancy, and in whom the law presumes title. Surely this would not harmonize with the rule of law so frequently declared and acted upon,—that the plaintiff must recover on the strength of his own title. If such a rule were allowed to prevail here, the result would be that the plaintiff might recover the 75 feet claimed in this action, and McMahon, Swift, and others might recover the 237 feet conveyed to them in another action. This action could not possibly be a bar to one brought by them, and thus the grantees of Phillippi would recover 312 feet upon conveyances from a person who had but 200 feet himself. This seems to be the legitimate result of the rule insisted on by the plaintiff's counsel. That a mere naked trespasser cannot show outstanding title as against one claiming by virtue of prior possession there

is no question; but that such trespasser can show that the plaintiff, or those from whom he derives title, has parted with his right of possession by conveyance, or lost it by abandonment, is equally well settled on principle, if not on authority.

Where bare possession is relied on, it is but the announcement of a clear principle of justice to say that a mere naked trespasser shall not be allowed to set up outstanding title to defeat the claim of one who by prior appropriation or occupancy shows a present right of possession. Ordinarily, the proof of outstanding title is no defense to the plaintiff's claim, and where it is not, such proof should not be allowed. In fact, this rule, so frequently misapplied, is only applicable in those cases where even admitting the outstanding title, still as against the defendant the plaintiff would be entitled to recover. If A, a mere naked trespasser, ousts B, it can be no defense to such ouster that the real title is in C, because B, being in possession, has a right which is good against A and all the world but the real owner; and as the inquiry in such a case would be confined to the question which of the two, A or B, was entitled to the possession, it is evident that it would avail A nothing to show that the real title was in C, as that would not justify his possession against one whom he had evicted, or who shows a prior possession to himself.

Possession itself is a title, though of the lowest and most imperfect degree: 2 Bla. Com. 195. Prior possession, then, is as potent to sustain ejectment against all subsequent trespassers upon that possession as the strict legal title itself would be; it would therefore be no defense in an action brought against a mere naked trespasser to recover possession upon such a title that the strict legal title was in another. But the action of ejectment rests upon a present right of possession in the plaintiff. If, therefore, before action brought the plaintiff conveyed away his title, or parted with his right of possession, or if he obtained no title from his grantors, to show that fact would not be so much showing title in a third person as that the plaintiff had voluntarily relinquished his right to the possession. That would be a direct answer and good defense to his claim of possession, whereas merely showing an outstanding title not derived from plaintiff would be no defense to his right acquired by prior possession. If the plaintiff acquired no title by the deed from Small to him, he would seem to have no ground upon which to recover in this case. It appears that prior to the time when defendants took possession of the

Uncle Sam claim the deeds offered in evidence had been executed, and if they conveyed anything, conveyed Phillippi's entire interest in the claim. Neither was he in the actual possession of the claim at the time defendants entered. True, those who had been his co-tenants were in possession, but in no view could their possession be considered his after he had conveyed away all his interest; they then held possession, not for Phillippi, but for his grantee. So the ouster complained of was not an ouster of the grantor of plaintiff, or those from whom he claims title, but an ouster of the first grantees of Phillippi, who alone would have a right to complain. If those deeds conveyed his title, what right had Phillippi when defendants entered upon the claim? He was neither in possession, nor had he the right of possession. Surely, then, he could show none of the facts which would entitle him to a recovery in ejectment. To support this action, the plaintiff must show a right of possession in himself at the time of bringing his action. Would not the showing of a conveyance by him or his grantors of all his interest in the claim at least go far to negative the presumption of such right of possession in him? If it can be shown that he is not entitled to possession because of his having abandoned his interest, upon what rule of logic or principle of law can it be said that the same fact may not be established by showing that by deed he conveyed away such right?

Are the loose circumstances by which abandonment is usually proven better evidence to show the relinquishment of a right than a deliberate conveyance by a deed? This view of the case seems to be fully sustained by the cases of *Bird v. Lisbros*, 9 Cal. 1 [70 Am. Dec. 617]; and the case of *Dyson v. Bradshaw*, 23 Id. 528.

All the remaining questions presented by the record in this case will necessarily be passed upon in reviewing the following instructions asked by the defendants and refused by the court:—

1. "The right to mine in the public land (and all land is presumed to be public) gives the occupant no title to the land. His only right is acquired by his appropriation in the manner prescribed by mining laws, and this right, after being acquired, is continued only by use and occupation, and is lost by failure to use or occupy."

2. "The jury is authorized to find that a party loses his

right in mining ground by such failure even without an intention to abandon."

No questions, perhaps, have ever engaged the attention of our courts which involved principles of greater or more general importance than those presented for our consideration upon the instructions in this case. If we follow the reason and spirit of the decisions by the supreme court of California upon analogous questions, but few serious difficulties will present themselves in the solution of all the questions presented by the record in this cause; but if, on the other hand, they be disregarded, and we adopt the theories of the learned counsel for appellants, we are at once launched into chaos and endless uncertainties, with no precedent to guide, and no legislation to direct the inquiries of the courts. Blindly to follow precedent, regardless of the reasons upon which it is founded, or its applicability to the character and the social and political condition of the people whom it is to affect, would be no less unwise than to ignore and repudiate it entirely. The decisions of the higher courts become part of the common law of our country, and they carry with them a weight of authority in proportion to the ability of the court rendering them, and the obvious reasons upon which they are based. We do not feel authorized, therefore, to disregard such adjudications and adopt theories the innovation of which might bring upon us more evils than are now occasioned by the defects of the present system.

Certainty in the law, more, perhaps, than in any other feature, gives it efficacy and secures the object for which it is created. Fluctuating and conflicting adjudications would be no less prolific of evil than conflict and uncertainty in the legislative enactments of a state. So far, then, as the anomalous rights and character of the miner locating upon the public land for the purpose of mining are defined and established by the courts of California, we feel it our duty to recognize them whenever their decisions may be applicable to our condition. Nearly the entire mining interest of this state has grown up under the fostering protection of the law as it was administered and recognized by the courts of that state. To repudiate the theory and principles upon which they have acted would be to overturn the foundation upon which half our rights rest. The right to the possession of a mining claim acquired by appropriation and occupancy may be lost,—1. By forfeiture, where such rights are acquired and regulated by mining laws;

2. Where no mining laws exist, and the right rests upon bare possession by failure to occupy or to work the claim with reasonable diligence; and 3. By abandonment.

Usually the mining claims in this state have been located and worked with direct reference to the mining laws established in the district where the location is made. Such mining laws when once established are recognized by the courts, and indeed, the legislature of our state has given them the force and binding obligation of legislative enactment: Stats. 1861, p. 21, sec. 77. When those mining laws, therefore, directly point out how mining claims must be located, and how the possession once acquired is to be maintained and continued, that course must be strictly pursued, and a failure to do so might work a forfeiture of the ground. By the mining laws of the Gold Hill district, all persons locating a claim were required to do three days' work upon it each month, or that work to the amount of fifty dollars would hold it for six months. If in that district neither of these requirements were complied with, there would be a forfeiture of right under those laws. When, therefore, the courts presume title in the first appropriator, it can only be a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired. We do not claim that the failure to comply with the conditions imposed by mining laws would work a strict forfeiture, but a kind of forfeiture recognized by the courts of this coast from the earliest day, and which is certainly founded upon rational and just principles. But in the absence of mining laws, and where the miner's right rests solely upon his possession, a different rule would obtain. The miner then locating a claim would hold only by actual occupancy, and by such work for the development of the mine as would under all the circumstances be deemed reasonable, and his right of possession would only be continued by occupancy and use. Such a claim might be lost by the failure to work upon or develop it with reasonable diligence, and the same amount of work which would hold a claim under the mining laws might not in all cases be sufficient to hold one where no such laws existed. The loss of right in that case would therefore present a very different question from a loss occasioned by failure to comply with the requirements of mining laws. "Abandonment" is a word which has acquired a technical meaning, and there can be no reason why a different signification should be given to it when applied to the loss of

right to a mining claim than that which it has received in the books. It is defined to be "the relinquishment of a right; the giving up of something to which we are entitled."

In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry; for there can be no strict abandonment of property without the intention to do so; thus differing from the loss of right by forfeiture under mining laws, or by the failure to use and occupy where no such laws govern; and in this, too, that abandonment may be complete the very instant the miner leaves his claim, for time is not an essential element of abandonment; the moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete. But lapse of time may often be a strong circumstance when connected with others to prove the intention to abandon, though the bare lapse of time, short of the statute of limitations, and unconnected with any other circumstance, would be no evidence of abandonment, though the right might be lost as before stated.

The cases upon which counsel rely to sustain the position that mere lapse of time, short of the statutes of limitation, will work an abandonment are cases in equity, where the persons claiming its interposition had no strict legal rights, but relied upon the equity of their cause.

In such cases, upon a cardinal principle of equity jurisprudence, no relief will be granted if there has been an unreasonable delay in asserting the right or claiming the interposition of equity. This seems to have been the only point decided in the case of *Pendergast v. Turton*, 1 Younge & C. 98; S. C., 20 Eng. Ch. 97. There the directors of the United Mills Mill Company seem to have had the power to declare the shares of any of the members of the company forfeited if the installments on such shares were not paid within fourteen days after the day fixed for the payment thereof. Pendergast's shares were so forfeited, and his only remedy was in equity to set aside the proceedings of the directors, and the court held that his delay in asserting or claiming his rights had been unreasonable, and denied the prayer of his bill. But had Pendergast a right which he could have claimed in a court of law, no time short of the statute of limitations would have deprived him of it. By the application of these general views to the facts in this case, it is evident that there could have been no forfeiture or loss of right on the part of Phillippi if

his co-tenants or partners remained in possession and held the ground as required by the mining laws, for the rule that the possession of one tenant in common or partner is the possession of all is too well established to be ignored at this time. But it is claimed that Phillippi abandoned his interest in the Uncle Sam company before his conveyance to Small. That he could abandon; and that his co-tenants or partners could have taken his interest when so abandoned, there is no doubt. But some circumstances beyond the mere lapse of time would be necessary to establish that fact. The case of *Waring v. Crow*, 11 Cal. 365, is directly in point here; and however much its authority may be weakened by the subsequent doubts of the learned judge who delivered the opinion of the court as to its accuracy, the decision is certainly based upon reason and the sounder principles of law. And though it is urged here with great earnestness that persons owning and associated together in working a mine are not tenants in common, but mining partners, the result in this case would seem to be the same in whichever character they may be clothed. The authorities generally seem to clothe such persons with the double character of mining partners and tenants in common. As to liabilities properly incurred in the development of a claim, they have been held to be answerable as partners; but with relation to the claim itself, they seem to be generally recognized as tenants in common, and there seems to be no sufficient reason for departing from those authorities in this case. We conclude that the possession of one partner or tenant in common inures to the benefit of all until such possession becomes adverse; and that the absence of Phillippi, and refusal to pay assessments for a period short of the statutes of limitation, would give his partners or tenants in common no right or title adverse to him in his interest in the Uncle Sam claim; but such lapse of time, with other circumstances tending to show abandonment, might go to the jury to establish it. There seems to be no urgent necessity for adopting a new rule at this late day, as there seems to be no obstacle in the rule itself to complete justice in any case. If one partner or tenant in common, after having become associated with his co-tenants in the development of the claim, voluntarily leaves it in the possession of his companions, and refuses to bear his proportion of the expenses incurred by them in development of the same, and should afterwards bring his action to recover

his interest, undoubtedly, upon a proper application, the equity side of the court would defer his recovery until he had paid his full proportion of the expense incurred in the development and improvement of the claim; and on the other hand, if he had been wrongfully ousted from his possession or rights, the persons so ousting him, or those claiming under them, can acquire no title in the claim adverse to him short of the statute of limitations, and of course could not ask the interposition of equity.

In this view of the case, the court below properly gave instructions 2, 5, 6, and 9 asked by plaintiff, and erred in refusing to give instructions 1, 2, and 3 asked by defendants.

The judgment below must be reversed, and a new trial ordered.

BEATTY, J., having been counsel in a similar case against the Uncle Sam company, did not participate in the hearing of this cause.

OFFICERS DE FACTO, WHO ARE: See note to *Hildreth's Heirs v. McIntire's Devisees*, 19 Am. Dec. 63; *Police Jury v. Hare*, 20 Id. 294; *Wilcox v. Smith*, 21 Id. 213; *Burke v. Elliott*, 42 Id. 142; *Plymouth v. Painter*, 44 Id. 574; *St. Louis County Court v. Sparks*, 45 Id. 355; *State ex rel. Knowlton v. Williams*, 68 Id. 65; *State ex rel. Leal v. Jones*, 81 Id. 403. An officer *de facto* is distinguished on the one hand from a mere usurper of an officer, and on the other from an officer *de jure*: *State ex rel. Corey v. Curtis*, 9 Nev. 338, quoting the principal case.

ACTS OF OFFICERS DE FACTO ARE VALID AS TO THIRD PERSONS AND PUBLIC: *Pearce v. Hawkins*, 58 Am. Dec. 54, and note collecting prior cases; *Burton v. Patton*, 62 Id. 194; *State ex rel. Knowlton v. Williams*, 68 Id. 65; *Shelby v. Alcorn*, 72 Id. 169; *Hardesty v. Taft*, 87 Id. 584. The principal case is cited to this effect in *Meagher v. County of Storey*, 5 Nev. 251.

JURISDICTION OF INFERIOR TRIBUNAL MUST AFFIRMATIVELY APPEAR: *Piper v. Pearson*, 61 Am. Dec. 438, and note collecting prior cases; *Gunn v. Howell*, 62 Id. 785; *Cooper v. Sunderland*, 66 Id. 52; *Morrow v. Weed*, 66 Id. 122, and note; *Root v. McFerrin*, 75 Id. 49; and see the principal case referred to in *Scorpion S. M. Co. v. Marsano*, 10 Nev. 380.

OUTSTANDING TITLE, WHEN MAY BE SET UP TO DEFEAT EJECTMENT: See *Burr v. Spencer*, 68 Am. Dec. 379, and note; *Bird v. Liebros*, 70 Id. 617; *Piercy v. Sabin*, 70 Id. 692; *Savage v. Dooley*, 73 Id. 680; *Doe ex dem. Olegg v. Fields*, 75 Id. 450; *Fitzpatrick v. Fitzpatrick*, 75 Id. 681; *Griffin v. Sheffield*, 77 Id. 648, and note.

MINING CUSTOMS, EFFECT OF: See note to *McClintock v. Bryden*, 63 Am. Dec. 103; *Brown v. '49 and '56 Quartz Mining Co.*, 76 Id. 468; *English v. Johnson*, 76 Id. 574; *Beatty v. Gregory*, 85 Id. 546.

ABANDONMENT IS NOT POSSIBLE WITHOUT INTENTION TO ABANDON: Note to *Wyman v. Hurlburt*, 40 Am. Dec. 464; *Keane v. Cannovan*, 82 Id. 738.

ABANDONMENT, LENGTH OF TIME ESSENTIAL TO: See note to *Wyman v. Hurlburt*, 40 Am. Dec. 465; *Hads v. Braxton*, 79 Id. 88; *Keane v. Cannova*, 82 Id. 738.

POSSESSION OF ONE CO-TENANT IS POSSESSION OF ALL: *Warfield v. Lindell*, 77 Am. Dec. 614, and note collecting prior cases.

VAN DOREN v. TJADER.

[1 NEVADA, 230.]

INDORSER OF PROMISSORY NOTE BEFORE DELIVERY TO PAYEE IS PRIMA FACIE GUARANTOR; although a mere indorsement in blank is not sufficient to establish the liability of such guarantor under the Nevada statute requiring a guaranty to express the consideration.

GUARANTOR OF PROMISSORY NOTE WILL NOT BE DISCHARGED BY HOLDER'S FAILURE to demand payment and give notice of non-payment, it seems, as in case of an indorser; but a reasonable notice of demand and non-payment only is required, and even that is excused where the maker is insolvent at the time the note becomes due.

GUARANTY MUST BE IN WRITING, AND MUST EXPRESS CONSIDERATION, under the Nevada statute, although it be made at the time of the principal contract, and upon the same consideration. A mere indorsement in blank of a promissory note before delivery to the payee is therefore not sufficient as a guaranty.

ACTION to recover money on a promissory note. The facts are stated in the opinion.

Atwater and Flandreau, for the appellants.

Clayton and Clarke, for the respondent.

By Court, LEWIS, C. J. This action was brought to recover the sum of three hundred dollars on a promissory note which it is alleged in the complaint was on the twenty-seventh day of January, A. D. 1864, executed and delivered by the defendants to the plaintiff.

It is further alleged in the complaint that the defendants Winters and Hopkins signed the note as sureties; that they became and were original parties thereto, and joint makers by the indorsement of their names upon the back thereof, at the time of its execution, and before the delivery of the same to the plaintiff.

It is also alleged that the defendant Tjader at the time of making the note and continuously since that time has been and now is wholly insolvent, and that there is now due plaintiff from defendants on said note the sum of three hundred dollars.

To this complaint the defendants Winters and Hopkins in-

terpose a demurrer, assigning as grounds therefor that the complaint does not state facts sufficient to constitute a cause of action against them, in this:—

1. That it appears by the complaint that they are not primarily or originally liable on the note, but only secondarily and conditionally liable thereon as sureties for the maker, and have not been notified of the presentment to, demand of payment of, and refusal of payment by, the maker.

2. That it appears from the complaint that the defendants Winters and Hopkins are indorsers, and not original makers, of the note, and that no demand and notice is alleged.

3. That it appears from the complaint that they signed the note as guarantors, and not as makers, and that it is not alleged that they have ever been notified of the non-payment and dishonor thereof by the maker, A. W. Tjader.

Two points are presented for investigation in this case:

1. What character does an irregular indorser in blank of a negotiable promissory note, who signs his name upon the back at the time of the execution and delivery, occupy?—whether he is to be treated as an original maker, a strict indorser, or as a guarantor; and 2. What are his responsibilities?

The authorities, it must be admitted, are irreconcilably conflicting, and it cannot be said that any rule is now definitely settled; indeed, the only fact fully determined by the authorities is, that nothing at all has been settled. The earlier decisions in New York uniformly held an irregular indorser liable as the maker of the note: *Manrow v. Durham*, 3 Hill, 584; *Luqueer v. Prosser*, 1 Id. 256; S. C., 4 Id. 420; *Miller v. Gaston*, 2 Id. 188; *Hough v. Gray*, 19 Wend. 202; *Ketchell v. Burns*, 24 Id. 456; *Allen v. Rightmere*, 20 Johns. 365 [11 Am. Dec. 288]. But all these cases have subsequently been overruled, and an irregular indorser in blank signing his name upon the back of a negotiable note at the time of its execution is now held in that state to be an indorser, entitled to strict notice, and discharged by the failure to present for payment and to give strict notice of non-payment: *Spies v. Gilmore*, 1 N. Y. 321; *Ellis v. Brown*, 6 Barb. 282; *Waterbury v. Sinclair*, 26 Id. 425; *Cottrell v. Conklin*, 4 Duer, 45.

This same doctrine has been recognized in some other states, but no satisfactory reason is given for holding that an entire stranger to a note, and one who never had an interest in it, should be held only as an indorser.

These decisions are also in direct conflict with the general

rule that there can be no strict indorsement of a negotiable promissory note except by the payee or an indorsee.

The rule requiring the presentment for payment to the maker, and strict notice of non-payment to the indorser, in general embodies no principle of justice to recommend it to the favorable consideration of the courts. And as the strict legal rules governing the duties and liabilities of indorsers often work hardship and injustice, they should not be extended so as to embrace cases not already clearly within their scope. To extend it, therefore, to a class of cases not clearly within its scope would be abandoning the manifest purpose and spirit of the law for its rigorous rules.

The general rule governing the responsibilities of guarantors, on the other hand, is founded upon the clearest principles of equity, and has that at least to recommend its adoption where any doubt exists as to what rule should be followed.

In many of the states, an irregular indorser in blank is *prima facie* regarded as a guarantor: *Klein v. Currier*, 14 Ill. 237; *Webster v. Cobb*, 17 Id. 459; *Carroll v. Weld*, 13 Id. 682 [56 Am. Dec. 481]; *Camden v. McKoy*, 3 Scam. 437 [38 Am. Dec. 91]; *Cushman v. Dement*, 3 Id. 497; *Smith v. Finch*, 2 Id. 321; *Carr v. Rowland*, 14 Tex. 275; *Cook v. Southwick*, 9 Id. 615 [60 Am. Dec. 181]; *Watson v. Hurt*, 6 Gratt. 633; *Clark v. Merriam*, 25 Conn. 576; *Beckwith v. Angell*, 6 Id. 315; *Perkins v. Cutler*, 11 Id. 213. And this certainly seems to be much the most reasonable rule. The intention of the parties to a contract is always the object which is to govern the court in its interpretation, and in ascertaining the rights and obligations of the parties to it. If this rule should be recognized in these cases, it would be difficult to see how a person not a party to a negotiable note signing his name upon the back of it could be treated as a maker. The very fact of the name being indorsed upon the back would be some evidence at least against the presumption of his intention to become primarily liable as a maker of the note. Deeming the position of guarantor in a case of this kind most consonant with justice, reason, and the intention of the parties, we feel bound to follow the rule as laid down in *Klien v. Currier*, *supra*, and the cases above cited; though under the statute of this state a mere indorsement in blank is not sufficient to establish the liability of such guarantor.

The authorities in California which hold that a guarantor is

entitled to strict notice as an indorser are counter to the long and well established rules in all the other states, and we have therefore no disposition to follow them.

With the exception of the decisions of that state, it is uniformly held that reasonable notice of demand and non-payment only is required, and even that is not required where the maker is insolvent at the time the note becomes due: *Lewis v. Brewster*, 2 McLean, 21; *Foot v. Brown*, 2 Id. 369; 3 Kent's Com. 121.

The contract of guaranty is a separate and independent contract, involving duties and imposing responsibilities very different from those created by the original contract, to which it is collateral.

It is a promise "to answer for the debt, default, or miscarriage of another," and by the statute of frauds it is made void unless there be some note or memorandum thereof in writing expressing the consideration upon which it is based; and for those reasons it has frequently been held that a guarantor cannot be jointly liable with the maker of a note, nor joined in the same action; but section 15 of our practice act ignores this rule, and expressly authorizes the joinder of a guarantor and the original obligor in the same action.

The contract of guaranty must, however, be in writing, signed by the party to be charged, and it must express the consideration. A mere indorsement in blank is not sufficient, nor are any words which do not express the consideration upon which the agreement rests. It has frequently been held by some of the highest courts of this country that when the guaranty of a promissory note is simultaneous with the making thereof, the consideration of the note will sustain the guaranty; and as the holder of the instrument has the right to fill up the contract in accordance with the intention of the parties, an irregular indorsement in blank was sufficient to answer the requirements of the statute. Whether those decisions were correct or not under the statutes upon which they were based, is a question of no consequence here, for the same courts which established that rule have subsequently, upon the amendment of the statute so as to make it like ours, held that the strict letter of the statute must be followed; that the contract of guaranty, though made at the time of the principal contract, and upon the same consideration, must be in writing, and must express the consideration which sustains it. These authorities are directly in point

here, and clearly follow the plain letter of the statute: *Brewster v. Silence*, 11 Barb. 144; *Glen Cove Mutual Ins. Co. v. Harrold*, 20 Id. 298. There are cases in California where it is held that the consideration expressed in the original obligation is sufficient to sustain the contract of guaranty made simultaneous with it, but none of them go so far as to hold that a mere indorsement in blank answers the requirements of the statute.

The complaint in this action clearly shows that there was no such agreement or memorandum in writing as the law requires on the part of Winters and Hopkins, but only that they indorsed their names upon the back of the note at the time of its execution.

The demurrer is therefore well taken, and the judgment of the court below must be reversed.

A petition for rehearing of the principal case was denied, Beatty, J., delivering the opinion, in which Lewis, C. J., and Bronson, J., concurred. It was explained that the court in the first place arrived at the conclusion, which it thought was sustained by reason and a multitude of authorities, that the appellants were guarantors, and not makers or indorsers. In the second place, the court was compelled by the language of the Nevada statute, and by the authority of the New York courts in interpreting a similar statute, to hold that the appellants, being guarantors, were not legally bound, because their guaranty was not in writing, expressing the consideration therefor.

The objection that the point on which the case was decided was not raised by the demurrer, nor urged on the argument of the case, but appeared for the first time in the opinion, was disposed of by the statement that the demurrer was because the complaint did not state facts sufficient to constitute a cause of action; and if the court found that the facts stated in a complaint, with all legal intendments in its favor, would not support the judgment, the court could do no less than reverse it, although the counsel for the appellants may not have hit on the proper grounds for a reversal. The appellants urged that they were only guarantors, and not bound, because they were never notified of the dishonor of the note by the principal. The court held with the appellants that they were only guarantors, but held that they were not bound for a different reason than that assigned by counsel. To the objection that it did not appear by the pleadings that the appellants were to answer for the debt, default, or miscarriage of another, it was answered that when the whole complaint was taken together, it showed that they did not make the note, and that their indorsement amounted only to a guaranty. The court further maintained, against the position that the complaint was not demurrable, that the pleading simply showed that the appellants wrote their names on the back of the note simultaneously with the execution, and that this did not show a *prima facie* cause of action against them. The point urged in the petition that the appellants admitted making the contract, and did not interpose the plea of the statute, was disposed of by the remark that the question was whether the complaint was sufficient to support the judgment, and the appellants, having demurred, admitted the truth of whatever was contained in the complaint, and nothing more.

The court was satisfied that the promise to answer for the debt of another, and the consideration for that promise, need not be contained in the same paper, provided the signature of the guarantor be connected with both; but one or more papers signed by the guarantor must show the consideration of his guaranty. Admitting that the names written on the back of the note connected the appellants with all that was written on the face, there was nothing on the face of the note showing the consideration of their guaranty. A note imported consideration to the maker, but it did not import a consideration for a guaranty of its payment by a third party. The intent of the statute seems to have been that the writing itself, without extraneous evidence, should show the consideration for the guaranty.

INDORSER OF NOTE BEFORE DELIVERY TO PAYEE, LIABILITY OF: See *Moore v. Cross*, 75 Am. Dec. 326, and note collecting prior cases; *Bigelow v. Colton*, 74 Id. 633, and note.

GUARANTOR OF NOTE, WHETHER ENTITLED TO NOTICE OF NON-PAYMENT: See *Brenner v. Weaver*, 83 Am. Dec. 444, and note.

CONSIDERATION OF GUARANTY, WHEN REQUIRED TO BE EXPRESSED IN WRITING: See *Draper v. Snow*, 75 Am. Dec. 408, and note; *Roberts v. Griswold*, 84 Id. 641. The principal case is quoted in *Houghton v. Ely*, 28 Wis. 215, per Paine, J., dissenting, to the point that the contract of guaranty must be in writing, signed by the party to be charged, and must express the consideration. A mere indorsement in blank is not sufficient, nor are any words which do not express the consideration upon which the agreement rests.

GIBSON v. CHEDIC.

[1 NEVADA, 497.]

GRANTOR MAY REVOKE CONVEYANCE IN TRUST FOR BENEFIT OF CREDITORS if they refuse to accept its terms.

REVOCATION BY GRANTOR OF CONVEYANCE IN TRUST FOR BENEFIT OF CREDITORS MAY BE EFFECTED, if the creditors refuse to accept its terms, by deed, or by procuring the trustee to reconvey to the trustor or to a third person.

THIRD MORTGAGEE'S TITLE BECOMES ABSOLUTE, AND SECOND MORTGAGE IS CUT OUT, by a purchase at a foreclosure sale under the first mortgage, and obtaining a sheriff's deed thereunder. It would be the same thing if prior to the sale under the first mortgage the third mortgagee obtained the legal title.

ACTION in equity. The opinion states the facts.

J. J. Williams and Thomas E. Haydon, for the appellants.

R. M. Clarke, for the respondent.

By Court, BEATTY, J. This is an equity case arising out of the following state of facts: In 1862, Milne and Chedic are alleged to have been the owners of a saw-mill and a large tract of land in Ormsby County. January 25, 1862, Chedic mortgaged his undivided interest to Jonathan Wilde for one

thousand dollars. April 30, 1862, he gave a second mortgage to plaintiff, Gibson, to secure a note for one thousand dollars, with interest at ten per cent per month from date.

May 17, 1863, Milne united in a mortgage to S. B. Martin to secure seven thousand dollars and interest. This last mortgage included not only the mill and land owned jointly or as tenants in common by Milne and Chedic, but also the separate homestead property of Chedic. In the summer of 1862, Wilde commenced suit to foreclose his mortgage. Judgment was had on the 26th of November, 1862. Chedic's interest in the land and mill property was sold under Wilde's decree, and he became the purchaser.

In May, just before the expiration of the six months after sale, S. B. Martin, as a holder of a subsequent mortgage, redeemed the same by paying the amount of Wilde's lien, with lawful percentage and charges. There being no subsequent redemption from him after the expiration of more than sixty days, he obtained a sheriff's deed for that interest. This deed was dated in July, 1863.

During the summer of 1862, about the time Wilde was instituting or prosecuting his foreclosure suit, Milne and Chedic, being greatly embarrassed, conveyed the mill property and land adjacent to one Lewis, nominally for twenty thousand dollars, but by a verbal arrangement between the parties it was agreed that Lewis should hold the land in trust to pay certain creditors of Milne and Chedic, the expense of running the mill, etc. (including a compensation agreed upon for his services); and after the net profits of the mill had paid these debts of Milne and Chedic, the property to be redeeded to them. Lewis found after accepting the deed that he could not execute the trust. Some, if not all, of the creditors objected to the arrangement.

The laborers employed upon the mill would not work for him. Lewis, finding his scheme impracticable, took no steps in executing the trust. It is not shown that a single one of the creditors for whose benefit in part the trust was created agreed to accept it, whilst some expressed their dissent in the most positive terms. Under this state of things, the appellant Martin came to Carson to look after his interest in this property, he having a mortgage for seven thousand dollars on the same, and a piece of property belonging individually to Chedic. He applied to Lewis to know about his interest or claim upon the property. Lewis stated the circumstances attending the

execution of the deed to himself, admitted he held the title in trust for Milne and Chedic; that he was unable to execute the trust, and would deed the land to Martin if so requested by Milne and Chedic.

After some negotiation between the parties, it was agreed that the land should be deeded to Martin; that if Chedic or his wife should pay two thousand dollars to him within eight months he would credit the same on his mortgage, and release Chedic's homestead. Chedic tried to get him to release the homestead simultaneously with taking the deed to the mill property and the lands; but this he refused to do, because the property for which he was getting a deed was not in his opinion worth the full amount of his mortgage and the prior liens.

Upon this state of facts, the referee who tried the case found that Martin took the deed from Lewis subject to all the trusts under which Lewis received it; and that he, holding the land as trustee for Milne and Chedic and their creditors, when he redeemed from Wilde, redeemed not for himself, but as trustee for Milne and Chedic and their creditors. The referee held that Martin took the title to this land as trustee for these parties, because Lewis so held it, and Martin taking a deed from Lewis with knowledge of the fact that he held it subject to these trusts must also be treated as holding under the same trusts. The appellants contend: 1. That the deed to Lewis being absolute on its face, no unwritten parol evidence could be introduced to show it was in fact a deed made in trust for the purposes explained by the parol evidence; 2. That if such proof could be legitimately introduced, still this conveyance could not be held to operate as a deed in favor of creditors who absolutely rejected its provisions. The first point it is not necessary to discuss. We believe it to be settled law that when a deed is made in trust for the benefit of creditors, and they refuse to accept its terms, the party making the conveyance may revoke it: 2 Story's Eq. Jur., sec. 1036 b. Admitting that this was a trust deed to Lewis for the benefit of creditors, and these creditors refused to accept of its terms, Milne and Chedic clearly had a right to revoke it. That revocation might have been made by deed. It might have been effected by procuring Lewis to redeed the land direct to them, or to deed it to a third party for a consideration to be paid by that party to them. It appears to us that this was precisely the nature of the transaction between Martin, Milne and Chedic, and Lewis.

The deed of Lewis to Martin, made with the assent of Milne and Chedic, and upon a consideration passing between them and Martin, operated as a revocation or extinguishment of the trust. The creditors were not injured (at least they had no right to complain) by this arrangement, because they had either positively refused to accept the terms of the trust, or had failed to give notice of their acceptance.

In either case, the trust deed was revocable without consulting them. That it was not the intention of any of the parties to this transfer to Martin that he should occupy the position of trustee for the general creditors of Milne and Chedic is evidenced by the fact that in his negotiation with the other parties he refused to accept the deed and release his mortgage, because the property was not of sufficient value to pay his debt and prior liens.

It is not to be supposed he would have accepted a position of trustee which would have put other debts not then a lien upon the property (such as the demands of mill-hands) ahead of or on the same footing with his debt. The whole transaction indicates that Martin was desirous of obtaining possession of the property, not as trustee for others, but to make his own debt more secure. The other parties to the deed were willing to give him that position with whatever advantage he could derive from Lewis's deed upon consideration of his making a favorable arrangement with Chedic about releasing his homestead. We are of the opinion, then, that Martin did not occupy the position of trustee for the creditors, or any of the creditors of Milne and Chedic, but that he either stood as the holder of the fee of the land for his own use, and subject to the prior encumbrances, or else he held the position of third mortgagee, with the equitable right to redeem the land from the prior mortgagees, and hold it as security for his original debt and his expenditures to redeem it from the prior mortgages. In either case his rights were the same. If he bought in or paid off the prior mortgages, he had a lien on the land for the amount thus expended. But if there was a judicial sale under the senior mortgage on the property, and he purchased at that sale, or redeemed from one who did purchase, and obtained a sheriff's deed, that put him in possession of a full and complete title to the land, so far as the mortgagor had title when he executed the mortgage. This of course cuts off all junior mortgages.

The cause is reversed, and the plaintiff's bill will be dismissed by the court below.

Another case growing out of the transactions of the parties in the principal case is *Gibson v. Mils*, 1 Nev. 526.

REVOCATION OF ASSIGNMENTS FOR BENEFIT OF CREDITORS. — In England it is well settled that a voluntary assignment in trust for the benefit of creditors, not communicated to them, and who are not made parties thereto and privy to its execution, conveys a mere power or agency to the assignees, which may be altered or revoked at the pleasure of the assignor: *Note to Oakley v. Hubbard*, 44 Am. Dec. 426; 2 Perry on Trusts, sec. 593; *Burrill on Assignments*, 5th ed., secs. 125, 361; 2 Story's Eq. Jur., sec. 1036 b; *Walkoy v. Coutts*, 3 Sim. 14; S. C., 3 Mer. 707; *Garrard v. Lord Lauderdale*, 3 Sim. 1; S. C., 2 Russ. & M. 451; *Lane v. Husband*, 14 Sim. 656; *Acton v. Woodgate*, 2 Mylne & K. 492; S. C., 3 L. J. Ch., N. S., 83; *Wilding v. Richards*, 1 Coll. C. C. 656; S. C., 14 L. J. Ch., N. S., 211; *Page v. Brown*, 4 Russ. 6; *Simmonds v. Palles*, 2 Jones & L. 489; *La Touche v. Earl of Lucan*, 7 Clark & F. 772. At one time it seems to have been thought that a communication by the assignees to the creditors of the fact of the assignment would not defeat the power of revocation by the assignor: See *Garrard v. Lord Lauderdale*, *supra*; but the contrary opinion may now be regarded as established: *Acton v. Woodgate*, *supra*; *Griffith v. Ricketts*, 7 Hare, 299, 307; *Browne v. Cavendish*, 1 Jones & L. 606; *Glegg v. Rees*, L. R. 7 Ch. 71, 74. A verbal assent to the deed by several of the creditors renders it no longer revocable by the debtor: *Harland v. Binks*, 15 Q. B. 713, 721; and of course, where a creditor is a party to the deed, the deed as to him is irrevocable: *Mackinnon v. Stewart*, 20 L. J. Ch. 49.

In the United States, if an assignment in trust for the benefit of creditors be executed and delivered by the assignor, and accepted by the assignees, the express assent of the creditors thereto is not necessary, but will be presumed where the assignment is for their benefit; and the relation of trustee and *cestui que trust* between the assignee and the creditors is at once created. But it is said that if the assignment is directly to the creditors, the assent of the creditors is then necessary: *Nicoll v. Mumford*, 4 Johns. Ch. 522; *Cunningham v. Freeborn*, 11 Wend. 241; *Houston v. Nowland*, 7 Gill & J. 480; *Jones v. Dougherty*, 10 Ga. 273. It follows that not only may the creditors, who thus impliedly assent, compel the execution of the trust, *Bellamy v. Bellamy's Adm'r*, 6 Fla. 62; *Hyde v. Olds*, 12 Ohio St. 591, but it will stand as against the claims of other creditors: *Robinson v. Rapelye*, 2 Stew. 86, 98; *Kinnard v. Thompson*, 12 Ala. 487; *Maudlin v. Armistead*, 14 Id. 702; *Lockwood v. Nelson*, 16 Id. 294; *Abercrombie v. Bradford*, 16 Id. 560; *Governor etc. v. Campbell*, 17 Id. 566; *Brown v. Lyon*, 17 Id. 659; *Evans v. Lamar*, 21 Id. 333, 336; *Rankin v. Loder*, 21 Id. 380; *Ex parte Conway*, 4 Ark. 302, 360; *Hempstead v. Johnston*, 18 Id. 123; S. C., 65 Am. Dec. 458; *De Forest v. Bacon*, 2 Conn. 633; *McFerran v. Davis*, 70 Ga. 661; *Stewart v. Hall*, 3 B. Mon. 218; *Bank of United States v. Huth*, 4 Id. 423, 434; *Reinhard v. Bank of Kentucky*, 6 Id. 252, 258; *Wiley v. Collins*, 11 Mo. 193; *Houston v. Nowland*, 7 Gill & J. 480; *Gale v. Mensing*, 20 Mo. 461; S. C., 64 Am. Dec. 197; *Scully v. Reeves*, 3 N. J. Eq. 84; S. C., 29 Am. Dec. 694; *Cunningham v. Freeborn*, 11 Wend. 241; *Tennant v. Stoney*, 1 Rich. Eq. 222; S. C., 44 Am. Dec. 213; *Skipwith v. Cunningham*, 8 Leigh, 271; S. C., 31 Am. Dec. 642; *Brooks v. Marbury*, 11 Wheat. 78; *Tompkins v. Wheeler*, 16 Pet. 106; *Brown v. Minturn*, 2 Gall. 557; *Lawrence v. Davis*, 3 McLean, 177; *Halsey v. Whitney*, 4 Mason, 206, 215; but an assignment will not be upheld as against execution creditors who levied before the deed was accepted by the assignee: *Crosby v. Hillyer*, 24 Wend. 280. If, however, the assignment is not necessarily beneficial to the creditors, their

assent will not be presumed, but must be shown; as where it postpones the time of payment of their debts: *Kemp v. Porter*, 7 Ala. 138; *Elmes v. Sutherland*, 7 Id. 262; *Smith v. Leavitt*, 10 Id. 92; *Lockhart v. Wyatt*, 10 Id. 231; S. C., 44 Am. Dec. 481; *Hodge v. Wyatt*, 10 Ala. 271; *Evans v. Lamar*, 21 Id. 333, 335; *Shearer v. Loftin*, 26 Id. 703; or where the assignment is conditional that the assignor shall be released: *McCain v. Pickens*, 32 Ark. 399; nor will the assent be presumed if the deed of assignment is fraudulent: *Townsend v. Harwell*, 18 Ala. 301; *Benning v. Nelson*, 23 Id. 801; *Ashley's Adm'r v. Robinson*, 29 Id. 112; *Baldwin v. Peet*, 22 Tex. 708; S. C., 75 Am. Dec. 806.

It also results that the assignment cannot be revoked by the assignor, nor annulled by the joint act of the assignor and assignee, without the consent of the creditors: Note to *Oakley v. Hubbard*, 44 Am. Dec. 575; Burrill on Assignments, sec. 361; 2 Perry on Trusts, sec. 593; *Lanier v. Driver*, 24 Ala. 149; *Ex parte Conway*, 4 Ark. 302, 359; *Forbes v. Scannell*, 13 Cal. 242; *Brown v. Chamberlain*, 9 Fla. 464, 479; *Sevier v. McWhorter*, 27 Miss. 442; *Scull v. Reeves*, 3 N. J. Eq. 131; S. C., 29 Am. Dec. 703; *Alpaugh v. Roberson*, 27 N. J. Eq. 96; *Measonier v. Kasman*, 3 Johns. Ch. 3; *Shepherd v. McEvers*, 4 Id. 136; S. C., 8 Am. Dec. 561; *Briggs v. Davis*, 20 N. Y. 15; S. C., 75 Am. Dec. 363; *Sheldon v. Smith*, 28 Barb. 593; *Bell v. Holford*, 1 Duer, 58, 78; *Walker v. Crowder*, 2 Ired. Eq. 478, 485; *Ingram v. Kirkpatrick*, 6 Id. 463; S. C., 51 Am. Dec. 428; *Stimpson v. Fries*, 2 Jones Eq. 156, 159; *Klapp's Assignees v. Shirk*, 13 Pa. St. 589; *Hall v. Denison*, 17 Vt. 310, 318; *Golden's Appeal*, 3 East. Rep. 313 (Pa.). Although if the trustee in a deed of trust for the benefit of creditors quitclaims all his right, title, and interest in the trust estate to the grantor, the latter will thereby be reinvested with the legal estate: *Huckabee v. Billingsly*, 16 Ala. 414; S. C., 50 Am. Dec. 183. In a few cases, however, the doctrine is not maintained to its full extent. Thus it is held that the assignment is not revocable after the assignee had notified the creditors: *Petriten v. Davis*, Morris, 296; nor after the creditors had filed a bill to enforce it: *Jones v. Dougherty*, 10 Ga. 273; nor is the assignment revoked by the death of the assignor: Id.; *Dwight v. Overton*, 35 Tex. 390; or by the resignation of the assignee: *McFerran v. Davis*, 70 Ga. 661. And in Massachusetts, prior to the act of 1836, the English rule was adopted: *Widgery v. Haskell*, 5 Mass. 144; *Stevens v. Bell*, 6 Id. 339; *May v. Wannemacher*, 111 Id. 202, 207; and see *Ward v. Lewis*, 4 Pick. 518, 520; but the statute of 1836 conformed the law to the general American doctrine: *Shattuck v. Freeman*, 1 Met. 10; *Small v. Sproat*, 3 Id. 303, 304; *Edwards v. Mitchell*, 1 Gray, 239. In Tennessee, also, it has been held that the assignor has a power of revocation before the creditors have information of the assignment: *Galt v. Debrell*, 10 Yerg. 144, 158; *Robertson v. Sublett*, 6 Humph. 313; *Brevard v. Neely*, 2 Sneed, 165; *Mills v. Harris*, 3 Head, 332; compare *Feld v. Arrowsmith*, 3 Humph. 442; S. C., 39 Am. Dec. 185; *Stockard v. Stockard's Adm'r*, 7 Humph. 303; S. C., 46 Am. Dec. 79; *Furman v. Fisher*, 4 Cold. 626; but the creditors will be presumed to have assented to the assignment after it comes to their knowledge. The right to revoke appears likewise to be asserted in *Gibson v. Rees*, 50 Ill. 383, 400; *Pitt's Trustees v. Viley*, 4 Bibb, 446. It has furthermore been said that there must be an assent, express or implied, by the creditor; and if there has been no express assent, and there are no facts from which assent can be implied, the assignment must be regarded as subject to the assignor's right of revocation: *Nelson v. Dunn*, 15 Ala. 501, 519; *Ashley's Adm'r v. Robinson*, 29 Id. 112, 124. The assignor's right to correct a defective assignment by a second assignment, either with or without a reconveyance to him before the rights of creditors

have become fixed, has also been sustained: *Ingraham v. Wheeler*, 6 Conn. 277; *Merrill v. Englesby*, 28 Vt. 150; *Brahe v. Eldridge*, 17 Wis. 184; *Rumery v. McCulloch*, 54 Id. 565; *Hone v. Wooley*, 2 Edw. Ch. 289; *Mills v. Argall*, 6 Paige, 577, 581; *Juliand v. Rathbone*, 39 N. Y. 369; *First National Bank v. Hughes*, 10 Mo. App. 7; *Morrison v. Shuster*, 1 Mackey, 190; and see *Porter v. Williams*, 9 N. Y. 142; *Gates v. Andrews*, 37 Id. 657; but compare *Metcalf v. Van Brunt*, 37 Barb. 621; *Baker v. Harlan*, 3 Lea, 505; *Union National Bank v. Bank of Commerce*, 94 Id. 271.

REVOCATION OF VOLUNTARY SETTLEMENTS OR TRUSTS. — While there is a difference of opinion, as seen above, between the English and the American authorities as to the power of an assignor to revoke an assignment in trust for the benefit of creditors, no such difference exists as to the power of a settlor or trustor to revoke a voluntary settlement or trust for the benefit of a third person. It is well settled in both countries that where a voluntary settlement or trust in favor of a third person is perfectly created, without the reservation of a power of revocation, it cannot be revoked without the consent of all the parties in interest, nor will it be set aside in the absence of fraud, mistake, or undue influence: 1 Perry on Trusts, sec. 104; *Brookbank v. Brookbank*, 1 Eq. Cas. Abr. 168, pl. 7; *Villers v. Beaumont*, 1 Vern. 100; S. C., 1 Eq. Cas. Abr. 23, pl. 2; *Bale v. Newton*, 1 Vern. 464; S. C., 1 Eq. Cas. Abr. 23, pl. 3; *Clavering v. Clavering*, 2 Vern. 473; S. C., 1 Eq. Cas. Abr. 24, pl. 6; *Broughton v. Broughton*, 1 Atk. 625; *Ellison v. Ellison*, 6 Ves. 656; *Pulvertoft v. Pulvertoft*, 18 Id. 84; *Petre v. Espinasse*, 2 Mylne & K. 496; *Bill v. Cureton*, 2 Id. 503; *Rycroft v. Christy*, 3 Beav. 238; *Newton v. Asken*, 11 Id. 145; *Smith v. Lyne*, 2 Younge & C. Ch. 345; *Kekewich v. Manning*, 1 De Gex, M. & G. 176; *Paterson v. Murphy*, 11 Hare, 88; *In re Way's Trusts*, 2 De Gex, J. & S. 365; *Paul v. Paul*, L. R. 19 Ch. Div. 47; *Light v. Scott*, 88 Ill. 239; *Hildreth v. Elliot*, 8 Pick. 293; *Salisbury v. Bigelow*, 20 Id. 174, 183; *Stone v. Hackett*, 12 Gray, 227; *Sherwood v. Andrews*, 2 Allen, 79; *Falk v. Turner*, 101 Mass. 494; *Viney v. Abbott*, 109 Id. 300; *Sewall v. Roberts*, 115 Id. 262; *Keyes v. Carleton*, 141 Id. 45; S. C., 55 Am. Rep. 446; *Sowterbye v. Arden*, 1 Johns. Ch. 240; *Bunn v. Winthrop*, 1 Id. 329; *Gilchrist v. Stevenson*, 9 Barb. 8; *Ritter's Appeal*, 69 Pa. St. 9; *Fellows's Appeal*, 93 Id. 470; *Stone v. King*, 7 R. I. 358; S. C., 84 Am. Dec. 557. It has even been held that where lands are conveyed in trust for the benefit of third persons, and their children yet unborn, such trust could not be revoked, although the trustee and all the beneficiaries in being unite in reconveying the lands to the donor free of the trust: *Isham v. Delaware etc. R. R.*, 11 N. J. Eq. 227. In *Stone v. Hackett*, *supra*, Bigelow, J., says: "A voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions will be enforced and carried into effect against all persons except creditors or *bona fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery." Certain modern cases seem, however, to regard deeds of trust to a greater extent to be under the control of the donors: See *Coutts v. Acworth*, L. R. 8 Eq. 558; *Wellston v. Tribbe*, L. R. 9 Eq. 44; *Everitt v. Everitt*, L. R. 10 Eq. 405; *Hall*

v. *Hall*, L. R. 14 Eq. 365, reversed in L. R. 8 Ch. 430; *Garnsey v. Mundy*, 24 N. J. Eq. 243. It has also been held that a purely voluntary conveyance in trust, intended to promote the convenience and protect the interests of the grantor, and passing no present interest to others, may be revoked at will, although the deed contains no express power of revocation: *Frederick's Appeal*, 52 Pa. St. 338; *Rick's Appeal*, 106 Id. 528.

HARVEY v. SIDES SILVER MINING COMPANY.

[1 NEVADA, 589.]

MEASURE OF DAMAGE FOR INJURY TO PROPERTY IS NOT ALWAYS SUM OF MONEY which it would take to repair the injury, or to restore the property to the condition it occupied before the injury. In those cases where the cost of restoring it to its original condition will exceed its actual value, the value of the property, and not the cost of removing the injury, will be the proper measure of damage.

ACTION for damages for injuries to land. The facts are stated in the opinion.

Perley and De Long, for the appellant.

Hillyer and Whitman, for the respondent.

By Court, LEWIS, C. J. The facts in this case as presented to us by the transcript are substantially as follows: In July, A. D. 1863, the plaintiff purchased a certain lot in the city of Virginia, near the quartz lode claimed by the defendant, from persons claiming to have located it in 1860. Shortly after the conveyance to him, he graded about two thirds of it, and built a dwelling-house thereon at a cost of four thousand five hundred dollars, and inclosed the lot with a fence and stone wall. That the defendant, whilst sinking a shaft upon its ledge, deposited from one thousand to fifteen hundred tons of earth and rock on that part of the lot not graded or improved, broke down the fence and stone wall, and by turning water upon the lot destroyed the plaintiff's cellar; by reason of which he suffered an actual damage of about \$850, besides the loss of three weeks' rent of his house, and the use of that portion of the lot upon which the earth is deposited. The plaintiff claimed five thousand dollars damages, and recovered three thousand eight hundred. A motion for new trial having been made by the defendant and granted by the court below, plaintiff appeals.

Upon submitting the case, the judge charged the jury that the true measure of damage was the sum of money that it

would require to remove the dirt from the plaintiff's lot, with a reasonable compensation for injury to buildings and fencing, together with the amount of rent which was lost by reason of the unlawful acts of defendant.

If the jury were misdirected as to the law in this instruction, the new trial was properly granted. Under some circumstances the instruction would perhaps be perfectly correct, though clearly erroneous upon the facts as presented to us in this case. The measure of damage for injury to property is not always the sum of money which it would take to repair the injury, or to restore the property to the condition it occupied before the injury. In those cases where the cost of restoring it to its original condition will exceed its actual value (which may often be the case), the value of the property, and not the cost of removing the injury complained of, would be the proper measure of the damage. If the rule announced in the instruction were to be followed in all cases of this character, the damage recovered might often greatly exceed the value of the property appropriated or trespassed upon. In this very case, suppose the plaintiff had no improvements on the lot, and its real value would not exceed one thousand dollars, can it be claimed that the plaintiff would be entitled to recover what it would cost to remove the earth, which would exceed by two thousand dollars the actual value of the entire lot? As it is, had the jury taken the highest cost estimated by the witnesses for removing the dirt, it would have amounted in the aggregate to six thousand dollars, a sum exceeding the entire value of the property, whilst the plaintiff continues in the enjoyment of his dwelling-house and two thirds of his lot, and which do not appear to have suffered any permanent depreciation from the deposit of earth on the rear of the lot. If the dump-pile were a continuing injury, rendering the balance of the lot less valuable, and the house less convenient, and the cost of removing the dirt would not exceed the damage thus suffered by the plaintiff, it might have been correct to charge the jury that the proper measure of damage would be the cost of such removal; but on the other hand, if the cost of removing the earth would exceed the damage suffered by plaintiff, it would be error so to charge them.

Where an injury is done to a building, as in the case of *Walter v. Post*, 4 Abb. Pr. 389, cited by counsel for appellant, the cost of putting it in as good condition as it was before the injury would be the proper measure of damage, for in most

cases of the kind such cost would in fact be the actual damage suffered by the complainant; though where there was a total destruction of a building it was held that the value of the building, and not the cost of rebuilding it, was the proper measure of damage: *Wylie v. Smitherman*, 8 Ired. 236. So in *Jones v. Gooday*, 8 Mees. & W. 146, the English court of exchequer held that the proper measure of damage in an action of trespass for entering upon the plaintiff's close and carrying away the soil was the value of the land removed, and not the expense of restoring the premises to their original condition.

Though the charge given by the court in this cause might be correct in some cases, it is not the rule where, as in this case, the cost of restoring the property to its original condition might exceed its value or the actual damage sustained by the plaintiff. The new trial was therefore properly granted.

Ordered accordingly.

McCLUSKY v. GERHAUSER.

[2 NEVADA, 47.]

PLAINTIFF MAY PROVE THAT NOTE SUED ON was in the possession of defendant at the time of the trial, without alleging that fact in his complaint.

OWNER'S RIGHT OF ACTION ON NOTE is as perfect if it is in the possession of defendant as if it were in his own possession, and the fact of possession need not be alleged in the complaint.

WHERE NOTE SUED ON IS IN POSSESSION OF PLAINTIFF, he must produce it, as it is the best evidence; but if it is in defendant's possession, and he fails to produce it, the plaintiff may prove its execution and contents by secondary evidence.

PARTY NEED NOT PLEAD FACT WHICH when established has no effect whatever except to admit secondary evidence to sustain his right of action or ground of defense.

OWNER CANNOT MAINTAIN ACTION AT LAW upon a bill or note payable to bearer, or properly indorsed, but lost before maturity; he is compelled to apply to equity, stating the loss as ground for relief; for as a *bona fide* holder of such note taken in the ordinary course of business would have a right of recovery on it, the owner could not establish his right of recovery at law.

WHEN NOTE SUED ON IS IN POSSESSION OF DEFENDANT, plaintiff's remedy is complete at law.

IN ACTION ON NOTE WHICH IS IN POSSESSION of defendant, who is notified to produce it, and fails or refuses to do so, secondary evidence of its execution may be introduced.

JUDGMENT WILL NOT BE SET ASIDE, NOR NEW TRIAL GRANTED, on the ground of surprise, when from the applicant's own showing it appears

that if he had not been taken by surprise, the result would not have been different, or that the result of a second trial will be different.

JUDGMENT WILL NOT BE REVERSED for want of findings of fact not excepted to in the trial court.

NEW TRIAL WILL NOT BE GRANTED on ground of newly discovered evidence when such evidence will not change the result.

THE opinion contains the facts.

Pitzer and Keyser, for the appellant.

Lansing, and Campbell and Seely, for the respondent.

By Court, LEWIS, C. J. The first question naturally presented upon the record in this cause arises upon the admission of evidence at the trial to prove that the note sued on was in the possession of the defendant at the time of the trial, the appellant claiming that as there was no allegation of that fact in the complaint, no evidence could properly be introduced to establish it. In this he is clearly in error.

Such an allegation would have been entirely unnecessary. The gist of the action is the ownership of the note, and not its possession. Though it be in the defendant's possession, if the plaintiff be the owner, his right of action is as perfect as if it were in his own possession; and unless the defendant deny its execution, it would be unnecessary to introduce it in evidence at the trial. If the right of action would be complete and perfect in the plaintiff notwithstanding the note be in the possession of the defendant, we see no necessity for an allegation of that fact in the complaint. In pleading, it is only necessary to allege those facts which constitute the plaintiff's cause of action or the defendant's ground of defense. In an action upon a promissory note, the fact that it is in the possession of the defendant is in no wise material to the plaintiff's right of recovery.

It merely changes the character of the evidence which he will have to produce to establish the execution of the instrument.

If it be in his own possession, the note itself is the best evidence, and he would be required to produce it; but if it be in the defendant's possession, and he fails to produce it, the plaintiff is permitted to prove its execution and contents by secondary evidence.

Upon the rule contended for by the appellant, secondary evidence of the contents of a written instrument could never be introduced, though the destruction of the original be

proven, unless its destruction or loss be specially pleaded. We know of no rule which requires a party to plead a fact which when established has no effect whatever except to admit secondary evidence to sustain his right of recovery or ground of defense. There is a material distinction between the case where the party suing had lost a negotiable promissory note before maturity which was properly indorsed, and the case where it is in the possession of the maker, or the party against whom the suit is brought. When a note or bill payable to bearer or properly indorsed was lost before maturity, it was formerly held that the owner could not maintain his action upon it at all in a court of law, but was compelled to make application to the courts of equity for relief, for as a *bona fide* holder of such lost note taken in the ordinary course of trade would have a right of recovery on it, it would be impossible for him who had lost it to establish his right of recovery.

In equity, he who had lost a note might recover; but to entitle him to the aid of equity, it was necessary to set forth the loss of the note in his bill, because a court of equity will only lend its aid in those cases where there is not an adequate remedy at law. If the note were in the possession of the plaintiff, his remedy would be complete in a court of law. Hence the allegation of its loss, because necessary to bring the plaintiff within the pale of equity jurisdiction. But where the note was in the possession of the defendant, we apprehend it has never been held that the plaintiff was compelled to resort to equity for relief, or to allege the fact that the note was not in his own possession. We think it has always been held that this remedy is complete at law: Chitty on Bills, 301.

By the practice under the code, if the plaintiff wishes the note produced at the trial, the proper practice would be to notify the defendant to produce it; and if he fails or refuses to do so, secondary evidence of its execution may be introduced: Civil Practice Act, sec. 394. There was no error, therefore, in admitting proof of the fact that the note was in the possession of the defendant.

The second point made by appellant is, that the evidence thus introduced operated as a surprise upon him.

If in fact the note was not in his possession, he may well have complained of having been taken by surprise by the evidence of the plaintiff, for the general presumption is, that the note sued on is in possession of him who brings the action

upon it; and if the defendant had not convinced us by his own showing that a new trial would probably produce no different result, we would have no hesitation in saying that it should have been granted. But the evidence which the defendant presents to us, and which he claims might have been produced at the first trial had he supposed the plaintiff intended to prove that the note was in his (defendant's) possession, should not have the slightest weight in overcoming the case made out by the plaintiff, and we think could not possibly produce a different result in another trial. The case made out by the plaintiff was, that on or about the twentieth day of April, 1864, in the city of Virginia, the defendant executed and delivered the note in question to him. None of his witnesses swear positively as to the precise day of its execution and delivery. The proof which the defendant failed to produce at the trial, and which he offers to present if a new trial be granted, simply goes to prove that on the twentieth day of April, A. D. 1864, he was not in the city of Virginia. This is the only material fact sworn to by any of the witnesses whose affidavits were presented on the motion in the court below.

That fact if conclusively established would not even tend to defeat the plaintiff's case, or to contradict the testimony of any of his witnesses.

It is just as probable from the evidence of the plaintiff that the note was executed and delivered on the 19th or 21st as on the 20th.

The proof, therefore, that the defendant was not at Virginia on the 20th could have little or no weight in overcoming the case made out by the plaintiff. Had the precise day and place been positively fixed by him, evidence tending to show the defendant was not at that place upon the day fixed would doubtless have some weight in overcoming the plaintiff's proof. But in this case no precise day is fixed. To set aside a judgment and order a new trial when by his own showing the surprise of which the defendant complains resulted only in depriving him of the opportunity of introducing evidence which would be no defense to the plaintiff's right of recovery, or tend to disprove his case, would be clearly erroneous.

Usually when a judgment is set aside or a new trial is granted, it is for the purpose of correcting some error or irregularity committed at the former trial, by which the rights of the party making the application were prejudiced, or to relieve him from an injury resulting from such surprise as could not

have been guarded against by ordinary prudence. If it appears that a party has suffered no injury from the irregularity or surprise complained of, the courts have uniformly refused to award a new trial. So it is also denied when it is evident that a second trial will not or should not change the result. When, therefore, an application is made to set aside a judgment on the ground of surprise, and it appears from the applicant's own showing that if he had not been taken by surprise, the result would not have been different,—or at least unless it appears that the result of a second trial will probably be different, a new trial should not be granted: 3 *Graham and Waterman on New Trials*, 968, 969.

It is also urged by the appellant that the judgment should be reversed because the court below failed to find whether or not a certain judgment obtained by the plaintiff against the defendant in the month of January, A. D. 1865, constituted a bar to the present action. The record does not show that this fact was called to the attention of the court below, or that any exception was taken to that failure on the part of the court.

When an exception is not taken in such case, the judgment will not be revised. Section 2, page 394, statutes of 1864-65, explicitly provides that "in cases tried by the court without a jury, no judgment shall be reversed for the want of a finding of the facts, unless exceptions be made in the court below to the finding or to the want of finding." Upon this point, therefore, we cannot reverse the judgment.

As to the newly discovered evidence, we have already shown that it is not of that character which would be likely to change the result of the first trial.

And unless it be probable that the newly discovered evidence will produce a different result, a new trial should not be granted: 3 *Graham and Waterman on New Trials*, 1043.

The judgment of the court below must therefore be affirmed, and it is so ordered.

UPON PROOF OF LOSS OF NOTE, action on it may be maintained at law: *Moore v. Fall*, 68 Am. Dec. 297, and note; if the note is not negotiable or has not been negotiated: *Rowley v. Ball*, 15 Id. 266; *Chaudron v. Hunt*, 20 Id. 60; *contra: Edwards v. McKee*, 13 Id. 474.

IN SUIT IN EQUITY ON LOST NOTE, proof of the loss must be made: *Temple v. Gove*, 74 Am. Dec. 320, and note.

NEW TRIAL WILL NOT BE GRANTED when verdict on retrial must be the same, although the court may have committed error: *McConnell v. Kibbe*, 85 Am. Dec. 265, and note; *Brown v. Bowen*, 86 Id. 406.

JUDGMENT WILL NOT BE REVERSED for want of findings of fact when objection thereto is not made: *McKeon v. McDermott*, 83 Am. Dec. 86; *Warren v. Quill*, 9 Nev. 263; *Carpenter v. Warner*, 38 Ohio St. 420, both the latter citing the principal case.

NEWLY DISCOVERED EVIDENCE IS NOT GROUND for a new trial, if it would not change or modify the result: *Teal v. State*, 68 Am. Dec. 482, and note 486.

McDONALD v. PRESCOTT AND CLARK.

[2 NEVADA, 109.]

NO PRESUMPTION IS MADE IN FAVOR of the jurisdiction of justices' courts, or courts of inferior jurisdiction.

MERE RECITAL IN JUSTICE'S JUDGMENT that summons was duly served is not sufficient to establish jurisdiction, and in such case the party claiming under the judgment must produce the summons and return thereon, together with the transcript of the justice's docket, to show jurisdiction.

CONSTABLE'S SALE MAY BE COLLATERALLY ATTACKED by showing that the certificate of sale falsely states the particular property sold.

OFFICER MAY GENERALLY JUSTIFY UNDER EXECUTION regular on its face, but he must show both judgment and execution, when he levies on property which has been sold by defendant in execution, so as to make the sale good as between him and his vendee, but not good as against creditors, as where there has been a *bona fide* sale but no delivery.

THE opinion states the facts.

McRae and Rhodes, for the appellants.

By Court, BEATTY, J. This was an action instituted to recover certain personal property. Plaintiff alleges that prior to and on the 10th of October, 1865, he was the owner of and in the possession of certain chattels; that on that day they were taken out of his possession by defendant.

Defendants, for answer, first, deny that plaintiff was the owner of the goods sued for on the day stated, or on any other day; secondly, defendants aver that the goods in controversy were the property of the Sheba company, and justified the taking under an execution sued out from the district court of Humboldt County against said company; thirdly, defendants say that if plaintiff ever had any possession of the chattels in dispute, it was obtained by fraud and collusion. Then follow certain averments setting out the particulars of the alleged fraud, showing that plaintiff's only claim to the property was under a sale, or a pretended sale, made by a constable, in pursuance of certain alleged fraudulent schemes; and winding

up with an allegation that the property in dispute was not sold by the constable, but that he made a false and fraudulent certificate of purchase to plaintiff, including this property, and that the property was never delivered to plaintiff, but remained in possession of the Sheba company.

The plaintiff moved to strike out all that part of the answer which relates to the alleged fraudulent doings of plaintiff, the constable, etc. This motion was sustained, and the parties then went to trial.

The plaintiff, to prove his right to the property, introduced a judgment entered by a justice of the peace in Star township in favor of Edward Jones against the Sheba company, the execution issued thereon, the return of the officers on the execution, and the officer's certificate of sale, showing a sale to himself of the property now in dispute.

The defendants objected to this testimony, on the ground that there was nothing in the transcript from the justice's docket showing that the Sheba company had ever been served with summons, or that the justice had jurisdiction of the case. This objection we think well taken.

There is a recital in the transcript from the justice's docket to this effect: "Summons issued, returnable August 17, A. D. 1865, at 11½ o'clock, A. M. August 15, 1865." "Summons in the above case duly served, returned, and filed, August 17, 1865, 12½ o'clock, A. M."

Nothing is presumed in favor of the jurisdiction of courts of limited jurisdiction. The recital that the summons was duly served, without stating the facts as to how, when, or where it was served, is not sufficient. It is merely the opinion of the justice that the service was sufficient. Possibly a court of superior jurisdiction might if the facts were before it hold otherwise.

There was no appearance of the Sheba company. Default was taken against that company.

We cannot under such circumstances presume the justice had jurisdiction: *Lowe v. Alexander*, 15 Cal. 296.

The summons and return thereon should have been produced with the transcript to show jurisdiction. It was error to admit the evidence as offered.

Defendants also offered to show that the constable did not sell the property in dispute at the constable's sale, although the certificate of sale stated that he had sold this property to plaintiff.

The court ruled this evidence out, on the ground that the defendants could not attack the constable's sale collaterally.

As we understand the offer, it was to prove the constable never did offer this particular property for sale. This was legitimate evidence. Supposing the constable's sale to have been a regular one on a valid judgment, plaintiff only got title to the property really sold to him by the officer. The constable's certificate could not make a title to plaintiff for property that he never sold him. We know of no rule of law which would estop a party from inquiring whether such certificate contains the truth or a falsehood. It was error to refuse to admit this evidence. In this case it was a pertinent inquiry as to whether the property really was sold by the constable, or whether it was through fraud, ignorance, or mistake inserted in the certificate as having been sold, when in reality it never was.

We are inclined to the opinion that the court erred in striking out a part of the defendants' answer. The answer, however, is rather defective, and we would suggest an amendment before this case is retried. The answer would have been more perfect if in addition to the execution it had alleged a good and subsisting judgment against the Sheba company. It fails also to show that defendants or either of them was an officer.

An execution regular on its face will sometimes justify the officer; but when an officer levies on the property which has been sold by the defendant in execution in such a way as to make the sale good as between him and his vendee, but not good against creditors (as, for instance, where there has been a *bona fide* sale, but no delivery), the officer must show not only an execution, but a judgment.

The judgment is reversed, and remanded for further proceedings, with leave to defendants, if they desire it, to amend their answer.

NOTHING IS PRESUMED IN FAVOR OF JURISDICTION of a justice of the peace; it must be affirmatively shown: *Spear v. Carter*, 48 Am. Dec. 688; and the same rule prevails as to all courts of inferior jurisdiction: *Root v. McFerrin*, 75 Id. 49, and note 62. Recitals in the decrees of such courts do not give jurisdiction: *Sakonetall v. Riley*, 65 Id. 334.

IRREGULARITIES IN JUDICIAL SALES cannot be taken advantage of collaterally, but must be attacked directly: *Reed v. Austin*, 45 Am. Dec. 336; *Bigg v. Cook*, 46 Id. 482; *Lanson v. Jordan*, 70 Id. 596. And as to parol proof to show what property was sold, see *Chasteen v. Phillips*, 69 Id. 700, and note.

OFFICER MAY JUSTIFY UNDER WRIT REGULAR UPON ITS FACE: *Billings v. Russell*, 62 Am. Dec. 330; *Keniston v. Little*, 64 Id. 297; *Emery v. Hapgood*, 66 Id. 459, and notes to these cases. He need not show the judgment: *Farley v. Lea*, 32 Id. 680, and note 683.

HOWARD v. RICHARDS AND RICHARDS.

[2 NEVADA, 123.]

COMPLAINT IN ACTION ON PROMISSORY NOTES, which sets them out in full, and shows the execution, delivery, maturity, and ownership of them, and that there is a certain sum "due, owing, and payable" thereon, is sufficient without a direct allegation of non-payment.

CORRECTNESS OF COST BILL CANNOT BE REVIEWED UPON APPEAL when there is no statement or bill of exceptions, and the appeal is simply from the judgment, which shows no irregularity in the allowance of costs.

MOTION TO STRIKE OUT COST BILL, made long after the appeal is perfected, cannot be reviewed upon an appeal from the judgment, as the cost bill is no part of the judgment roll.

MISTAKE IN AMOUNT FOR WHICH JUDGMENT SHOULD BE RENDERED should be corrected by motion in the lower court, and cannot properly be raised on appeal for the first time. The court, however, in this case deemed it their duty to correct the error, but imposed appeal costs upon appellant.

ACTION on promissory notes stated in full with other facts in the opinion. The facts as to the cost bill, as found in the opinion by Beatty, J., and given *post*, are substantially as follows. On December 18, 1865, judgment was ordered entered for plaintiff as prayed for in his complaint. On the next day, and before judgment was formally entered, an order was made staying proceedings for ten days to enable defendants to perfect an appeal. On December 28, 1865, notice of appeal was served and filed. On the next day, the judgment was entered, and an undertaking on appeal filed. On December 28, 1865, plaintiff filed his cost bill in the sum of \$194.75, which was included in the judgment, entered on December 29th. On January 8, 1866, defendants gave notice of intention to strike out the cost bill, and upon the motion being made, the court refused to strike it out.

Brumfield, for the appellants.

Atwater, for the respondent.

By Court, LEWIS, C. J. The complaint in this action was in the following form:—

"John Howard, the plaintiff, complains of the defendants, John Richards and Elias Richards, and for his cause of com-

plaint alleges that heretofore, to wit, on the nineteenth day of February, A. D. 1864, the said defendants made, executed, and delivered to the plaintiff their promissory notes in writing, of which the following are copies:—

“NEVADA TERRITORY, DOUGLAS COUNTY,
February 19, 1864.

“\$1,000. On the first day of November next, for value received, we promise to pay John Howard, or bearer, the sum of one thousand dollars in good lawful money of the United States of America.

“JOHN RICHARDS,
“ELIAS RICHARDS.

“DOUGLAS COUNTY, February 19, 1864.

“\$1,000. On the first day of May, A. D. 1865, for value received, we promise to pay John Howard, or bearer, the sum of one thousand dollars in good and lawful money of the United States of America.

“JOHN RICHARDS,
“ELIAS RICHARDS.

“That said notes are long past due, that the plaintiff is now the legal holder and owner thereof, and that there is due and owing and payable thereon from the defendants to this plaintiff the sum of \$2,333, for which sum the plaintiff prays judgment against said defendants, together with the costs of this action.”

To this complaint the defendants interpose a general demurrer, which was overruled by the court below; and upon the refusal of the defendant to answer, judgment was rendered in favor of plaintiff in accordance with the prayer of his complaint, from which the defendants appeal.

It is argued here that the complaint is defective in not alleging the non-payment of the notes, and for that reason the demurrer should have been sustained.

In our judgment, the complaint is sufficient, though it would have been a much better pleading had it contained a direct and positive allegation of non-payment. By the rules of pleading which have grown up under the code of procedure or practice act, all of the mere formal parts of pleadings which the common law required are dispensed with, and nothing is now required but a concise statement of the facts necessary to be proven to entitle the party plaintiff or defendant to the relief claimed. A complaint is sufficient if it contains a clear, positive, and direct statement of facts which if proven will entitle the plaintiff to the relief which he seeks.

This complaint certainly contains allegations of all the principal facts which it would be necessary to establish to authorize a recovery,—the execution and delivery of the notes, the maturity, the ownership of the plaintiff, and that at the time of bringing the action there was “due, owing, and payable” thereon a certain sum of money. The establishment of these facts would have entitled the plaintiff to judgment for the amount due on the notes. But it is said in the statement that there is a certain sum “due, owing, and payable” on them is not a sufficient allegation of non-payment.

It is provided by section 70 of the practice act that “in the construction of a pleading for the purpose of determining its effect, its allegations shall be literally construed, with a view to substantial justice between the parties”; and section 37 declares that “all forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed by this act.” When tested by the rule that pleadings must be liberally construed, with a view to substantial justice between the parties, we could scarcely say in a case of this kind, where the notes are fully set out, and the complaint shows the execution, delivery, maturity, and ownership of them, that the statement that there is a certain sum “due, owing, and payable” thereon is not a sufficient allegation of non-payment. Indeed, the law presumes the non-payment from the fact that they remain in the possession of the plaintiff. It is somewhat like the presumption of law that bills and notes are founded upon a sufficient consideration, and hence it is entirely unnecessary to allege a consideration in an action upon such instruments; and yet a complaint upon any other species of simple contracts must show the consideration upon which it is founded, or it will be radically defective.

In the case of *Allen v. Patterson*, 7 N. Y. 476 [57 Am. Dec. 542], it was held that a complaint was sufficient which in substance stated that the defendant was indebted to the plaintiff in a certain sum of money for goods, wares, and merchandise sold and delivered to the defendant at his request on the first day of May, 1849, at the city of Buffalo; that the items of account were twenty in number; and then concluding as follows: “And the plaintiffs say that there is now due them from the defendant the sum of \$371.01, for which sum the plaintiffs demand judgment.” It has been said in some of the subsequent cases in New York that this complaint was not an authority as

to the standard of definiteness and certainty required in pleadings, but it was not considered so defective as to warrant the court in sustaining the general demurrer interposed to it. Nor does the case of *Allen v. Patterson*, *supra*, come within section 162 of the New York code, which provides that in actions upon written instruments for the payment of money, it shall be sufficient to set out a copy of such instrument, and then state that there is a certain sum of money due thereon, because that was not an action brought on a written instrument.

Appellant claims that the case of *California State Telegraph Co. v. Patterson*, 1 Nev. 150, sustains his view of the complaint in this case. In that case, we merely held that the facts upon which the plaintiff was entitled to recover should be stated,—that it was not sufficient merely to state conclusions of law. But where all the facts necessary to constitute a cause of action are alleged, as in this case, we did not hold that a statement of a conclusion of law would vitiate the pleading. We conclude that the complaint is sufficient, and that the demurrer was therefore properly overruled.

As to the question raised upon the cost bill, we are unable to perceive how it can be reviewed upon this appeal. There is no statement or bill of exceptions. The appeal is simply from the judgment, which shows no irregularity in the allowance of costs. The motions made by the appellant, long after the appeal was perfected, to strike out the cost bill, cannot be reviewed upon an appeal from the judgment. The cost bill is no part of the judgment roll, and is not properly before us; we cannot therefore inquire into its regularity, nor into any proceedings which were taken after the appeal from the judgment was perfected.

Where there is no statement, and the appeal is simply from the judgment, nothing is brought to the appellate court but the judgment roll: Practice Act, sec. 280. The mistake in the calculation of the amount for which judgment should be rendered ought to have been called to the attention of the court below, and a motion made there to correct it if that could be done. Such a point cannot properly be raised in the appellate court for the first time: *Guy v. Franklin*, 5 Cal. 417. However, we deem it our duty to correct the error, but to impose the costs of this appeal upon the appellant.

The court below will therefore reduce the judgment \$158, which is the sum in excess of that for which properly judgment should have been rendered.

Beatty, J., concurred in the opinion of the court except as to the judgment for costs. After stating the facts, he referred to section 197 of the practice act, which requires the clerk, except in special cases, to enter judgment in conformity with the verdict within twenty-four hours after it is received. He also referred to section 453 of the same act, which provides that the party recovering judgment, and who claims costs, shall deliver to the clerk, within two days after the verdict or decision, a statement of the items of his cost bill. His honor then stated that what should be proper practice appeared plain from these two sections. That when one of the parties received a general verdict, or an order for judgment, it became the duty of the clerk to enter the judgment within twenty-four hours after the verdict or order. That as the party for whom judgment is rendered has two days within which to file his bill for costs, the judgment may be entered one day before the time for filing the cost bill has expired; the clerk, then, in making the entry, must leave a blank in the judgment for costs. If the cost bill is filed in time, it is his duty to fill the blank; if not filed, the blank remains, and cannot thereafter be filled. When, however, the blank is filled for nearly every purpose, it becomes part of the judgment, and must be considered as of date therewith. In support is cited *California State Telegraph Co. v. Patterson*, 1 Nev. 151, holding that although judgment had not been regularly entered by the clerk, still an appeal might be taken from a judgment ordered by the court, and a minute made of such order. The judge then expressed it as his opinion, that, at least for the purposes of appeal, when final judgment is entered, it is to be considered as bearing date by relation as of the time when it was ordered; that in the present case it must be considered as of date of December 18th, when it was ordered entered; that the clerk should have entered it either on that day or the next, leaving the blank for costs; that as no cost bill was filed before December 20th had expired, the judgment was then complete, and the clerk could not thereafter make any entry in or alteration of the judgment if he followed his strict duty, but that as he did not enter the judgment until December 29th, this did not affect the rights of the litigants; and that as plaintiff failed to file his cost bill until after two days from the time judgment was rendered and ordered entered by the clerk, the right to costs was lost. Citing in support *Chapin v. Broder*, 16 Cal. 418, 419. The learned judge then says: "Then if the plaintiff had no right to file his cost bill after the 20th, how were the defendants to take advantage of that failure? Clearly, I think, by appealing from the judgment. The costs were a part of the judgment, and if improperly included in the judgment, it was error. It might be very proper in such case, after the judgment was by the clerk made to include costs, to move in the lower court to correct the judgment, and not to appeal from the judgment until the lower court had refused relief. But if the lower court did refuse to correct it, then the appeal would be from the judgment, and not from the order refusing to correct the judgment. . . . Then if the appeal from the judgment was the right remedy, the only other question is, Does the record show that the cost bill was filed too late? . . . Respondents contend that on an appeal from the judgment, where there is no statement, the court can only look at the judgment roll."

Judge Beatty quotes section 203 of the practice act, which provides that "immediately after entering the judgment the clerk shall attach together and file the following papers, which shall constitute the judgment roll: 1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed

on the complaint that the default of the defendant in not answering was entered, and a copy of the judgment; 2. In all other cases, the summons, pleadings, and a copy of the judgment, and any orders relating to a change of the parties." He then quotes section 284 of the same act, which provides that "on an appeal from a final judgment, the appellant shall furnish the court with a copy of the notice of appeal, the judgment roll, and the statement annexed, if there be one, certified by the clerk to be a correct copy. On appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used in the hearing of the court below, such copies to be certified by the clerk to be correct. If any written opinion be placed on file in rendering the judgment, or making the order of the court below, a copy shall be furnished. If the appellant fail to furnish the requisite papers, the appeal may be dismissed." He then states the facts that the statute makes no provision for bringing up on appeal from the judgment the undertaking on appeal, the bill of exceptions, the verdict, nor the findings of fact; and states it as his opinion that it was not the intention of the legislature to limit the appellate court to an inspection of the things mentioned in section 284, *supra*, as it does not expressly say that no papers shall be brought up except those mentioned; that even if such was the intention of the legislature, the law would be void, because the court could not be deprived of the power of inspecting the whole record to ascertain the rights of the parties. That if an appeal is taken from a judgment, the record must be examined to determine if the judgment can be sustained. The complaint must be looked at to see if it is sufficient. If there is no answer, the summons and return must be interviewed to ascertain if defendant was properly served. And if there is judgment for costs, the record must be examined to find out if there is foundation for that part of the judgment, for without a cost bill there can be no judgment for costs. That if it appears from the cost bill that the judgment is erroneous, it must be corrected. The learned jurist in conclusion states that nothing in section 284, *supra*, precludes the bringing up of other matters not therein mentioned which are necessary to the determination of the rights of the litigants. That the present judgment should be considered as of date of December 18, 1865. "That no bill of costs having been filed on or before the 20th of December, the judgment that day was perfected, and the blanks for costs could not thereafter be filled up. It appearing from the filing of the cost bill that it was not filed before the 26th, it was a nullity, and that part of the judgment which is for costs is erroneous. That part of the judgment should be stricken out, and the appellant should recover his costs."

COMPLAINT IN ACTION ON PROMISSORY NOTE, WHEN SUFFICIENT: *Moss v. Cully*, 62 Am. Dec. 301.

JUDGMENT MAY BE AMENDED upon motion and notice to the adverse party: *Hill v. Hoover*, 68 Am. Dec. 70, and note. So the court of appeals may alter the judgment, disregarding technical errors: *Brownell v. Winnie*, 86 Id. 314.

ON APPEAL FROM JUDGMENT WITHOUT STATEMENT OF FACT, nothing will be considered but the judgment roll: *Corbett v. Job*, 5 Nev. 106; *Imperial Silver Mining Co. v. Barstow*, 5 Id. 253; *Williams v. Rice*, 13 Id. 235, all citing the principal case.

THE PRINCIPAL CASE IS COMMENTED ON AND DISTINGUISHED in *Klein v. Allenbach*, 6 Nev. 162, where it is held that on appeal from the judgment roll any error appearing therein will be corrected without a statement. In this case it appeared from the judgment roll that costs should not have been allowed.

BULLION MINING COMPANY v. CRESCUS GOLD AND SILVER MINING COMPANY.

[2 NEVADA, 168.]

WHERE PENDING ACTION IN EJECTMENT against several defendants holding distinct parcels of property plaintiff sells to one of such defendants, the latter may continue the suit as plaintiff against the other defendants. But it must be the same suit, and for the property claimed by the first plaintiff, and not for that and other property claimed by the last plaintiff, and united by an amended complaint to that originally sued for.

STATUTE OF LIMITATIONS. — **WHERE ACTION IS BROUGHT** before the statute begins to run, a substituted plaintiff cannot amend his complaint and incorporate a new cause of action so as to bar or embarrass the defense of the statute, which might be pleaded against the new cause of action.

WHERE JUDGMENT IS RECOVERED FOR PART of an undivided parcel of real property, plaintiff cannot expel the defendants from the possession of the whole tract if they have quietly submitted to a common or joint occupancy by the plaintiff with themselves.

ALL TENANTS IN COMMON MAY UNITE IN ONE ACTION for the possession of the common property. And one tenant may sue for his undivided portion. But whether more than one and less than all can unite in such action, *quere*.

WHERE MINER HAS SURFACE LOCATION, together with a lode following its dips, spurs, and angles, he is entitled to the surface and the lode wherever it may go, so far at least as it may extend under the public land.

WHERE MINER LOCATES LEDGE without any surface location, he is only entitled to the ledge.

WHERE MINER LOCATES LEDGE the outlines of which are visible on the surface, he is entitled to the surface.

WHERE BLIND LEDGE SEVERAL HUNDRED FEET BELOW SURFACE is located without any surface location, the locator is not entitled to any surface.

MINER MAY FOLLOW HIS LODGE wherever it may go, even though it runs under public lands which were in the occupancy of another before the mine was located, but the latter is entitled to protection in the use of his surface location.

COMMON-LAW DOCTRINE THAT RIGHT TO SURFACE OF EARTH gives a right to all beneath and above that surface has but a limited application to the rights of miners and others using the public lands of Nevada. The well-established customs of miners to locate veins of mineral, claiming to follow them with all their dips, spurs, and angles, without reference to the occupancy of the surface, has compelled a departure from common-law rules.

PLAINTIFF CANNOT RECOVER nor be put in possession of premises not described in the complaint, judgment, nor execution.

JUDGMENT FOR BLIND LEDGE OR LODGE situated several hundred feet below the surface of the soil, and with no surface location, does not entitle plaintiff to recover hoisting-works situated on the land of another, and erected to hoist ore from the ledge or lode recovered.

THE opinion states the facts.

Charles E. De Long, for the appellant.

Williams and Bizler, for the respondent.

By Court, BEATTY, J. On the 20th of November, 1863, Theodore Winters and some seven others, plaintiffs, filed a complaint against the Fairview Mining Company, the Croesus Mining Company, the Bullion Mining Company, the Minerva Mining Company, the Superior Mining Company, the Alpha Mining Company, and the Four-Twenty Mining Company, seeking to recover an interest in a certain mining claim, consisting of an "equal undivided eight hundred and seventy-five feet" in a claim described as "the Cosser & Co.'s claim. . . . Beginning on that certain gold and silver bearing quartz ledge in said district called the Comstock ledge, at the southern boundary of the claim formerly called the Webb and Kirby, and now known as the Chollar claim, and extending thence south along and following said Comstock ledge, with all its dips, spurs, and angles, a distance of sixteen hundred feet, . . . and extending on each side of said ledge one hundred feet."

The present appellant first demurred to this complaint, and on the demurrer being overruled, answered, and then, by leave of the court, put in a supplementary answer by way of amendment to the original answer.

Most, if not all, the other companies sued have put in some defense; but their answers are not material, as it regards the determination of the points before us.

No action is shown by the record to have been taken in the case after the answers filed until the evening of the 12th of May, 1865, when a part of the defendants were served with notice, affidavit, copy of amended complaint, etc.

The notice was to the effect that the plaintiffs next morning at ten o'clock would move the court to dismiss the complaint as to the defendant the Bullion company, make an order allowing the Bullion company to be substituted as plaintiff, and also allowing an amended complaint to be filed by the Bullion company.

At ten o'clock, those defendants who had been served with notice came into court and protested against the hearing, on the ground that the notice was insufficient, and appealed to a rule of the court requiring five days' notice of motions of this character.

The judge observed from the bench he would shorten the

notice, and ordered the motion to be heard at two o'clock that day. At two o'clock the motion was heard and sustained.

After the order was made as above stated, a notice was then served on the present appellant that the court would be asked to make the orders which in fact had already been made. The bill of exceptions says this notice was served on the appellant on the afternoon of the 16th of May. This date is evidently a mistake, because it is inconsistent with other statements in the same bill of exceptions.

It must have been served on the appellant after the 13th, and before the 16th; probably on the afternoon of the 15th. At the opening of the court on the 16th, the motion was called up and sustained. This was in effect only ordering that the appellant should be bound by the order which had already been made upon notice to other defendants.

The appellant protested against the whole proceeding as irregular, and calculated to deprive it of a fair opportunity of defending its rights in the case, and excepted to the ruling of the court.

The court ordered appellant to file its answer to amended complaint the next morning (the 17th of May), although they had never been served with copy thereof. On that morning the answer was filed, and the trial of the cause proceeded.

The amended complaint is not for an undivided interest of 875 out of 1,600 feet, but for the entire claim known as the Cosser claim, more particularly described as follows: "Sixteen hundred feet in length upon that certain quartz lode known as the Comstock lode, being the section of said lode bounded on the north by the claim of the Chollar Silver Mining Company, and extending southerly along said lode, and including all the dips, spurs, and angles thereof, a distance of 1,600 feet of the said lode, being bounded upon the west by a wall of dark green rock, which appears in the working shaft of the Bullion Mining Company at a depth of about 460 feet, and in the working shaft of the Chollar company at a depth of about 425 feet, having a dip to the east of from thirty to fifty degrees, and running in a general north and south course; and bounded upon the east by a heavy seam of clay selvage, which appears at the lower works of the said companies, and lies along the country rock which forms the eastern wall of said lode."

The case went to trial on this amended complaint. The jury found for plaintiff, and judgment was rendered for resti-

tution of the property as described in this amended complaint. After judgment, an execution was issued, and the sheriff put plaintiff in possession of certain hoisting-works of the appellant. The appellant, contending that the judgment did not embrace these hoisting-works, moved the court for an order to reinstate it in possession of said works. This the court refused. Appellant appeals from the judgment, and also from the order refusing to reinstate it in possession of the hoisting-works.

We think both appeals must be sustained. The original complaint was for only 875 out of 1,600 feet, or for an undivided interest of thirty-five sixty-fourths of the whole. This is all the original plaintiffs claimed.

If these plaintiffs sold out to the Bullion company, doubtless it would have been proper to substitute that company as plaintiff, and allow it to conduct the suit in its own way. We do not see that the fact that the Bullion company had originally been a defendant could make any difference. Here was a suit for mining ground which seems to have extended over the claims of several companies. If one of these companies, sooner than litigate the suit, chooses to buy plaintiff's claim, it had a right to do so. When that was done, the controversy was settled as to those parties. But in such a case, it would not be improper to allow the suit to continue as to the other defendants. But if continued, it must be the same suit, and not a new one. It must be for the property claimed by the original plaintiffs, and not for that property and other property claimed by the new plaintiff, united by a new declaration to that which was originally sued for.

If A were to sue B for a horse, and then assign the cause of action to C, C could not amend his complaint and charge that B had taken the horse from A, his assignor, and taken a yoke of oxen from C, the present plaintiff. Every one would at once see that this was uniting a new and distinct cause of action, arising to C alone, with the original cause of action, which arose to A. To allow this jumbling together of new and distinct causes of action, originally pertaining to different parties, would lead to much confusion, and to no good. We have seen no precedent for such a practice, and cannot believe it justifiable. In this particular case, the reasons for refusing to sustain such a course are still stronger than in the case supposed.

A statute of limitations was passed in the latter part of
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November, 1861, to take effect December 2, 1861, which limited all actions for the recovery of mining claims to two years after cause of action arose, but said statute not to begin to run against causes of action already existing until after its passage. When the first suit was brought, the statute had not run in any case, and could not be pleaded. This thirty-five sixty-fourths of the sixteen hundred feet was by the bringing of this suit protected from the running of the statute. But in a few days after the bringing of this suit, the right to sue for the remaining twenty-nine sixty-fourths of this claim may have been barred by the statute of limitations.

The appellant claims that such was the case. It certainly had the legal right to try to establish such a defense. It was not good practice to thus mix up two causes of action so as to prevent or embarrass such a defense. We mention this as an illustration of one of the many evils resulting from such a practice. If such a practice were allowed, all a plaintiff who finds himself about to be defeated has to do to throw the costs on a defendant is to assign his cause of action to some one who has a good cause of action against the defendant, and let the new party be substituted, and unite a new cause of action which he can sustain to the old one which cannot be supported, and thus mulct the defendant in all the costs. Such a practice is without precedent, unjust, and not to be tolerated.

No doubt, when a new plaintiff is substituted, he may, like any other plaintiff, amend his complaint, in a proper case, as to mere matter of form, provided it is substantially the same cause of action as that originally set out. The respondent claims that such was the case here; that although the original complaint was only for an undivided interest of 875 out of 1,600 feet, still, if a judgment had been had under that complaint, the plaintiffs would have been entitled to possession of the whole 1,600 against the appellant, a mere trespasser.

Upon this point respondent cites several California cases. Some of those cases establish this proposition, that where a plaintiff sues for a tract of land, claiming that he is entitled to the sole possession thereof, and shows on the trial that he is a tenant in common with others in the land, and that he and his co-tenants are entitled to the exclusive possession of the property described, he will be entitled to recover the entire tract against trespassers who hold adversely to him and his co-tenants. These California cases all seem to be based

on the authority of a case in Day's Reports, to which we have no access. Whether they are sound or not (of which, possibly, there is some doubt) we have not thought it necessary to inquire. That is not this case. Here the whole possession was not sued for. The judgment could be for no more than was claimed. If the plaintiffs had obtained judgment for thirty-five sixty-fourths, we know of no law which would have justified the sheriff in entirely expelling defendants from possession if they had quietly submitted to a common or joint occupancy by the plaintiff with themselves. We have certainly been referred to no authority on this point, and with our present light must hold such a recovery would only have entitled plaintiff to a common possession with defendants, and those owning the other twenty-nine sixty-fourths might become barred before the trial of the first suit.

For these reasons, we think the amendment should not have been allowed, and that the judgment rendered on that amended complaint is erroneous, and must be set aside. If the Bullion company can recover anything in this case, it can only be the thirty-five sixty-fourths sued for in the original action. This court has ruled that all the tenants in common of an estate may unite in one action under our statute for the possession of the common property. It is not disputed one tenant in common may sue for his undivided fraction. But this court has never decided, as counsel for respondent seem to think, that more than one and less than all the tenants in common of a piece of land may unite in such action.

This point, being one of much difficulty and doubt, we have not thought it necessary to decide, as this case must be reversed on other grounds. In this case, the appellants complain, and we think not without just ground, of precipitancy and haste in making the order for change of parties, time for filing answer, etc. But as the judgment is reversed on other grounds, it does not seem necessary to decide whether this undue haste and compulsion on the part of defendants to answer a new complaint, without time for reflection or consideration, would of itself have been sufficient to set aside the judgment.

The action of the sheriff in putting the plaintiff in possession of the appellant's hoisting-works was a clear and unmistakable trespass. The complaint on which the suit was tried describes nothing on the surface. It describes a lode (a Cornish word nearly synonymous with vein) bounded by certain

rocks, which are found, if we may believe the complaint, only at the depth of several hundred feet below the surface. When found at that depth, they are pitching, says the complaint, to the east at an angle of thirty to fifty degrees. Now, if these rocks are the boundaries of the claim sued for, and the rocks come no nearer the surface than two or three hundred feet, then the vein comes no nearer than two or three hundred feet. For the vein or lode is the matter contained between those two walls; where the walls terminate, there the veins terminate,—unless there should be a solid ledge arising from the vein, which supports itself without walls. But counsel for respondent seems to think that in an ejectment plaintiff must recover from the surface of the earth downwards. They seem to think it would be impossible to recover a vein without recovering the surface over the vein. At common law, the recovery in actions of ejectment and all real actions was usually for a portion of the earth's body or substance, somewhat in the form of an inverted cone or pyramid; the surface of the earth recovered being the base of the figure, and the apex at the centre of the earth. But the judgment rendered for a ledge, lode, or vein is quite different. It may include a portion of the earth's surface, where that surface has been properly located.

The plaintiff would, in case of a surface location, together with the lode following its dips, spurs, and angles, then be entitled to his pyramid carved out of the earth's body, having its base on the surface and its apex at the center of the earth. But if the lode dipped out of this pyramid, as they nearly always do, he could also have his judgment following this lode (usually in the form of a solid parallelogram) wheresoever it might go,—at least as far as it might extend under the public lands. But if a party locates a ledge without any location on the surface, he can only recover the ledge.

If the ledge comes to the surface, as is frequently the case, undoubtedly he is entitled to the surface. But that could only be where the outlines of the ledge are visible on the surface.

It will probably be suggested that if a party locating a ledge does not get any of the surface, he cannot get to his ledge, and the location will be valueless. This, we think, is rather an imaginary than a real difficulty. Nearly all ledges diverge more or less from the perpendicular. The owner has the opportunity of working them from a great many different points.

There would generally be no difficulty in finding some accessible point from which the vein might be reached that is not occupied. If all such points are occupied, then he must, like anybody else, buy what he wants.

If we were to hold that a party locating a blind ledge (one which does not show itself on the surface) must have a certain portion of the surface to work his ledge, where are we to give it to him? Nearly all ledges diverge more or less from the perpendicular. Frequently neither a ledge nor the wall rock inclosing veins or lodes reaches to the surface by many feet,—sometimes by many hundred feet. Now, if we are to extend such veins to the surface, where no particular surface ground has been located, what rule are we to follow?

If the walls are first found at a depth of two hundred feet below the surface, and at that depth have a dip of forty-five degrees, shall we ascend from the top of the wall rock by perpendicular lines to the surface, and give the ground included between those lines thus produced to the holder of the ledge? or are we to extend imaginary lines from the top of the wall rock to the surface at an angle of forty-five degrees, and give to the ledge-holder the ground between those two lines? It is evident there would be a difference of two hundred feet in the location of the two pieces of ground. To adopt either rule would be to endanger the improvements of others who might erect buildings in ignorance of the true location of the ledge. Sometimes ledges change their dip. At one time they may lie nearly flat, at another they may be nearly perpendicular. Sometimes the same ledge, as is claimed in this place, may dip to the west; then at a certain depth change and dip to the east. It would be impossible to adopt any sensible and practicable rule for extending to the surface the location of ledges or lodes that are located merely by name as extensions of known or marked ledges, where those locations show no cropings or indications on the surface. It is as necessary in every mining locality to have houses for boarding in, mechanics' and traders' shops, etc., as it is to have mines. They are as worthy of protection as the mines themselves. We cannot adopt any rule that will sacrifice the houses and shops of one class of citizens to promote the interest of another.

Whilst we depart from the rules of the common law so far as to let the miner follow his lode of quartz wheresoever it may go, even though it runs under public land which was in the occupancy of another before the mine was located, on the other

hand, the occupier of the surface is equally entitled to protection in the use of that surface if a miner having a senior location should in the course of time be found to run under his improvements. The doctrine of the common law, that he who has a right to the surface of any portion of the earth has also the right to all beneath and above that surface, has but a limited application to the rights of miners and others using the public lands of this state. Necessity has compelled a great modification of that doctrine. The departure from those old and established doctrines of the law will doubtless lead to many complications. To adhere to the common-law rules on this subject is simply impossible. To attempt to carry out common-law doctrines on this point would either give all the houses in Virginia to the mining corporations, or else all the most valuable mines to those occupying the houses. The well-established custom of miners to locate veins of mineral, claiming to follow them with all their dips, spurs, and angles, without reference to the occupancy of the surface, has compelled a departure from common-law rules.

In this particular case, a shaft sunk in the hoisting-works which are the subject of controversy penetrates the eastern wall rock, passes through it, and reaches the vein at the depth of about 250 to 255 feet. At this point the vein is dipping to the east at an angle of forty-five degrees. The eastern wall rock is of course pointing toward a spot on the surface (supposing the ground to be level) some 250 feet west of the disputed property. Consequently, if the wall were continued, the most easterly portion of the vein would be over two hundred feet west of the hoisting-works. If the eastern wall breaks off at any point above or west of where the shaft is sunk, whether a shorter or longer distance, the hoisting-works are still in any event east of that portion of the land lying perpendicularly over the vein where it comes nearest the surface.

But, say respondents, the vein, where it gets to within 200 feet of the surface, changes, and has a downward dip to the west instead of to the east, as it does at a depth of 250 feet. That seems to be the general theory among miners in regard to the Comstock lode. But there is no evidence that such is the case at this particular point of the vein. There is no evidence here of wall rocks approaching the surface nearer than 250 feet of the surface. The only croppings of the ledge spoken of in the testimony are eight hundred feet from the hoisting-works.

The surface of the ground on which these works are situated is not described in the complaint, the judgment, or execution.

The sheriff had no right to meddle with these works because the plaintiff's lawyers, witnesses, or somebody else supposed that if certain wall rocks run where according to their theory they ought to run, this piece of land would be within those walls.

Respondent makes an argument to prove that hoisting-works are a part of the freehold on which they stand; that these hoisting-works were erected especially to work this mine or lode, and therefore appurtenant to the mine, and must go with it. That the hoisting-works belong to the realty, and must go with the land on which they stand, we certainly believe to be a correct proposition. If the plaintiff was entitled to recover the land on which they stand, then it was entitled to have the works. If it could not recover the land, it could not recover the works. How the intention with which the works were erected could influence the plaintiff's right to recover the land on which they stand, we are at a loss to comprehend.

If plaintiff is entitled to recover these hoisting-works because they were erected to hoist ores from this mine, it would upon the same principle be entitled to recover an assay office in Virginia City, or any other place in Storey County, if one was erected there to assay ore from this mine. The object for which the works were erected has nothing to do with the question as to who is entitled to the ground on which they stand.

The judgment of the court below must be reversed. The plaintiff will be allowed either to dismiss its action, or to move the court to reinstate the pleadings as they stood before the order was made allowing the amended complaint to be filed.

The court will also make an order directing the sheriff to reinstate the appellant in possession of the hoisting-works from which it was ejected.

In this case a petition for rehearing was filed, alleging that the court erred in assuming that the original suit was for 875 feet of ground, and not for 1,600 feet. After examination, the court concludes that the original suit was only for 875 feet, as the complaint therein only alleged that plaintiffs were ousted from and entitled to the possession of that much. The court then say that if a co-tenant is in possession of the entire estate, and is ousted therefrom by a trespasser and stranger, he may upon a proper complaint recover the entire premises; but in order to do this, he must allege his possession to the whole estate, and ouster therefrom, or otherwise show his intention to sue for all the property, and his right to recover. In the original case

nothing of this kind was shown, as under the complaint nothing could be recovered but the 875 feet. To amend that complaint, then, so as to recover 1,600 feet, is to introduce a new cause of action. The petition argues that if such were the case, and the lower court erred in allowing the amendment, the error should be disregarded unless it caused or might reasonably have caused some detriment to the opposing party. In this connection the petition argues further, that if the action as to the remaining 725 feet was barred by the statute of limitations, it could have been pleaded to the part of the case embracing that amount of ground as readily as it could have been pleaded in a separate action therefor; and also that the plea of the statute could not have been interposed in this action, even if a separate suit had been brought for the 725 feet. In response to this portion of the petition, the court states it as their opinion that if defendants had had time, authority could have been found authorizing the interposition of the bar of the statute of limitations as to the 725 feet, but that as they were unnecessarily hurried into their defense, they failed to interpose the plea of the statute, and a recovery was had against them which never could have been recovered under more regular proceedings. And the court then says that they "cannot sanction such irregular, unprecedented, and dangerous practices merely because there is a possibility that counsel on the other side may by great astuteness and readiness be able to ward off threatened dangers." The opinion is then expressed that from the circumstances in the case, as stated in the first opinion, the defense of the statute of limitations could have been successfully interposed as to the 725 feet, either in the present suit or in a separate action for that much of the ground.

The petition next asks that the decision as to the hoisting-works be reviewed, and it is urged that they were between the walls of the vein, and that the shaft connected with the hoisting-works is entirely in vein matter from the top downward. The petition says: "Every vein must necessarily have and has two walls, and all matter embraced within those walls and denominated 'vein matter' is a part of the vein. The hoisting-house and machinery was upon and the entire shaft in vein matter; therefore they were between the walls of the vein or ledge." In response, the court say: "Admitting that every vein has outside walls, and all matter between those walls is vein matter, it certainly does not prove that all vein matter is contained between two walls. Vein matter may certainly be removed from between its original walls, either by artificial or natural means, and after such removal it does not cease to be vein matter. When we say that certain substances are vein matter, we may mean that those substances are now a component part of some mineral vein, or that at some past time they did constitute a part of the substance of some vein. It is well known that what miners call vein matter frequently rolls down a mountain side to a great distance from its original location in the vein; by the action of water it is carried to still greater distances. The hoisting-works in this case were on the side of the mountain. They may have been on vein matter which had rolled down the mountain for an indefinite distance. There is certainly no satisfactory evidence to show those works were within the walls of the ledge sued for, and therefore the sheriff, under a judgment for the quartz ledge, had no right to interfere with those works. The fact that the original complaint sues for the ledge and two hundred feet on each side of it can make no difference. The case was not tried on that complaint; therefore the first complaint has nothing to do with the question. This court only decided the sheriff had no right under that particular judgment to interfere with defendant's hoisting-

works. It did not decide what would be the effect of a judgment for the lode and two hundred feet on each side thereof. That question is not now before us."

An argument is then made in the petition to show that the use to which a thing is put determines whether it is a fixture, and that the hoisting-works in dispute come within that class of property. The court, while they admit that such works may be fixtures, contend that they only become such on the land on which they stand; and that as the plaintiffs in this case have failed to show any right of possession to the soil on which the hoisting-works stand, they are not entitled to such works. The court in conclusion say: "If they were not entitled to recover the soil, they could not recover the house standing thereon, although it was erected for the purpose (unlawful, perhaps, if you will) of taking ore from the plaintiffs' mine. The purpose for which a house is erected cannot change its locality. Nor can we see how that purpose is to affect in any way the rights of plaintiffs to recover the ground on which it stands. The petition for rehearing is denied."

TENANT IN COMMON, RIGHT of, to recover estate: *Toucharde v. Crow*, 81 Am. Dec. 108, and note 117.

OWNERSHIP OF MINE MAY EXIST independent of a surface location: *Caldwell v. Copeland*, 78 Am. Dec. 436, and note 440; note to *McClintock v. Bryden*, 63 Id. 101.

RIGHT TO MINE AND TO FOLLOW LEDGE on its dip into the lands of another: Note to *McClintock v. Bryden*, 63 Am. Dec. 91-108.

LOBDELL v. SIMPSON.

[2 NEVADA, 274.]

AT COMMON LAW, EACH RIPARIAN PROPRIETOR HAS EQUAL RIGHT to the use of the water which flows in the stream adjacent to his land as it was wont to run, without diminution or alteration. No proprietor has a right to use the water to the prejudice of another above or below without a prior right to divert it, or unless it is necessary for domestic uses and watering stock.

AS BETWEEN OCCUPANTS OF PUBLIC LANDS CLAIMING WATER by appropriation, he has the best right who is first in time; in other words, the prior appropriator is entitled to it to the extent appropriated to the exclusion of any subsequent appropriator for the same or any other use.

OCCUPANT OF PUBLIC LAND CLAIMING WATER by prior appropriation is not entitled to any greater quantity of water than he actually appropriated prior to a subsequent appropriation.

PRIOR APPROPRIATOR OF WATER OF STREAM has an absolute right to the quantity of water appropriated as against a subsequent appropriator of the water of the same stream, and he has a right to remove any obstructions from the natural channel, but he has no right to make any change therein that will injure the subsequent appropriator.

PRIOR LOCATOR UPON AND APPROPRIATOR of the water of a stream, as against a subsequent locator and appropriator of the water of the same stream, has no right to either raise or lower any dams, or to close up any ditches which may have existed at the time of his own and the location of others, if others are injured thereby.

SUBSEQUENT LOCATOR UPON STREAM, AND APPROPRIATOR of the water thereof, has a right to have it flow precisely as it did when he located.

THE opinion contains the facts.

Aldrich and De Long, for the appellant.

Quint and Hardy, for the respondents.

By Court, LEWIS, C. J. "Every proprietor of lands on the banks of a river," says Chancellor Kent, "has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run, without diminution or alteration. No proprietor has the right to use the water to the prejudice of other proprietors above or below him unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua curret et debet currere ut currere solebat*, is the language of the law. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of the water which would otherwise descend to the proprietor below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years, which is an evidence of it." This is the clear and well-settled general doctrine of the common law of watercourses. The quantity of water in a natural stream could in no case be diminished to the prejudice of other proprietors, except when necessary for domestic uses and for the watering of stock. If a reasonable use of the water for these purposes materially diminished the quantity to the prejudice of the proprietors below, no action would lie, because these were considered privileged uses. Some of the courts have held that it might also be taken for the purpose of irrigating land though the proprietors below were prejudiced thereby; the weight of authorities, however, would seem to be against those decisions.

Whilst every riparian proprietor has a right to the reasonable use of the water for any purpose which does not diminish its quantity or deteriorate its quality to the injury of those below him on the same stream, he has no right to use or detain it upon his own land for any purpose which would result prejudicially to any other. *Sic utere tuo ut alienum non lœdas*, is the maxim which the courts recognize as a rule which must govern riparian proprietors in the use of running water. The anomalous condition of the settlers and miners upon the pub-

lic land in California has induced the courts of that state to depart from the strict rules of the common law, and to recognize priority of appropriation as a foundation of right to the use of running water. The rule adopted in California, when viewed in the light of the necessities which induced its adoption, is founded upon the clearest principles of justice. The right to land in that state resting as it did for years upon no other titles but that of prior occupation and appropriation, the right to the use of running water was also acquired in the same way. So the doctrine is well settled in California that as between persons claiming water merely by the appropriation of the water itself, he has the best right who is first in time. "We presume that it is not to be doubted," says Judge Baldwin in the case of *Ortman v. Dixon*, 13 Cal. 38, "that the defendants, having first appropriated the water for their mill purposes, are entitled to it to the extent appropriated, and for those purposes to the exclusion of any subsequent appropriation of it for the same or any other use. We hold the absolute property in such cases to pass by appropriation as it would pass by grant." So in the case of *Butte Canal and Ditch Co. v. Vaughn*, 11 Id. 152 [70 Am. Dec. 769], Mr. Justice Field, in delivering the opinion of the court, says: "The first appropriator of the water of a stream passing through the public lands of this state has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation."

In this action, the plaintiff seems to have relied solely upon his prior appropriation of the waters of Desert Creek. No rights by virtue of his riparian proprietorship seem to have been claimed. True, in the amended complaint it is alleged that the natural channel of the stream passed through his land, and that the waters of the creek naturally flowed into and upon his premises. It is admitted, however, in the record, that he had no title in the premises, except as a mere occupant of public land, and he does not claim that thereby he is entitled to have all the waters of the creek flow in its natural channel upon his land, but simply that he is entitled to a certain quantity of water actually appropriated by him, to wit, three hundred inches. The entire complaint shows that nothing was claimed by the plaintiff by virtue of his occupancy of the land, but only by his actual appropriation of the water itself; and the prayer is, that the defendants, their agents, ser-

vants, employees, and all persons having or claiming to have interests by, through, or under them, be enjoined from appropriating any of the water of Desert Creek, except the surplus over and above what the ditches aforesaid will convey, to wit, three hundred inches of water with a six-inch pressure, and that the court decree to the plaintiff the right to that quantity of the water of said creek. As the main issue raised by the pleadings is priority of appropriation, the court erred in refusing to instruct the jury, as requested by the defendants, that "the plaintiff is not entitled to any greater quantity of the water of Desert Creek than he actually appropriated prior to the defendants' appropriation." What we might hold if the plaintiff had relied upon his rights as a riparian proprietor, and claimed the water of the creek by virtue of his ownership of the soil, it is unnecessary to say at present. We wish it understood, however, that the views expressed in this opinion are applicable only to those cases where the parties rely solely on the prior actual appropriation of water, which seems to be the case here. We do not deem it necessary to consider the question as to whether the Indian from whom the defendants claimed title could convey any right to them or not; for if the facts are correctly pleaded in the answer, and they can be established by proof, the defendants have a right to divert the water used by them, independent of any right existing in or derived from the Indian. It is alleged in the sworn answer of the defendants that the dam and ditch complained of by the plaintiff, and by which they divert the water from the natural channel of the creek, existed not only when the plaintiff located upon the stream below, but when defendants located their land above plaintiff, and that their ditch had been in no wise enlarged or the dam raised since the location and appropriation by the respective parties plaintiff and defendants. The first appropriator of the water of a stream has undoubtedly a right under the decisions in California to the quantity of water actually appropriated by him as against any one subsequently appropriating any of the water of the same stream, and he has a right to remove any obstructions from the natural channel. But so soon as others locate upon the stream or appropriate the water, the first locator has no right to make any change in the channel, either to raise or lower any dams, or to close up any ditches which may have existed at the time of his own and the location of others, if others are injured thereby. In other words, a person locating upon a

stream and appropriating the water has a right to have it flow (so far as the natural channel is concerned) in precisely the same manner as it did when he located; and no prior locator has any right to make any such change in the natural channel as will injure subsequent appropriators of the same water. If, as in this case, there was a dam in the stream, and a ditch conveying a certain quantity of water upon public and unoccupied land above the plaintiff at the time the plaintiff located, and he had not disturbed either, and the defendants take up the land and ditch, the plaintiff would have no right after such location by the defendants to destroy the dam or close up the ditch of defendants, if by so doing the defendants would be damaged. Neither would the defendants have any right to raise their dam or enlarge their ditch so as to deprive the plaintiff of the quantity of water appropriated by him. But they, on the other hand, have a right to claim that no dam which existed at the time of their location shall be torn down, if the tearing of it down would prejudice them.

The evidence in the case not being brought up, we are unable to determine what the rights of the defendants are; but if the facts exist as set forth in the answer, they have a right to maintain the dam as they found it at the time of their location. However, as the judgment must be reversed upon the error of the court in refusing to give the instruction above referred to, we deem it unnecessary to give the question any further consideration.

Judgment reversed and new trial ordered.

BROSNAN, J., did not participate in this decision.

RIGHT OF RIPARIAN PROPRIETOR TO USE OF STREAM: *Springfield v. Harris*, 81 Am. Dec. 715; *Rhodes v. Whitehead*, 84 Id. 631; *Brown v. Bowen*, 86 Id. 406; *Ferre v. Knipe*, 87 Id. 128, and notes to these cases.

WATER RIGHTS AS BETWEEN PRIOR AND SUBSEQUENT LOCATORS AND APPROPRIATORS: *Wixon v. Bear River etc. Mining Co.*, 85 Am. Dec. 69; *Union Water Co. v. Cravy*, 85 Id. 145, and notes to these cases.

PRIOR APPROPRIATOR OF WATER does not acquire an exclusive right thereto: *Heath v. Williams*, 43 Am. Dec. 265, and extended note thereto.

RIGHTS OF PRIOR APPROPRIATORS OF WATER: See, in addition to above cases, *Conger v. Weaver*, 65 Am. Dec. 528; *Bear River etc. Mining Co. v. New York Mining Co.*, 68 Id. 325; *White v. Todd's Valley Water Co.*, 68 Id. 338, showing when the first appropriator is not limited to the amount first taken; *Butte Canal etc. Co. v. Vaughn*, 70 Id. 769; *Kidd v. Laird*, 76 Id. 472, and notes to these cases.

PRIOR APPROPRIATOR OF WATER to beneficial purposes has, to the extent of his appropriation, the better right as against subsequent appropriators of

the water of the stream, above or below, and the first appropriator may conduct the water in canals, ditches, or flumes wherever he pleases, and apply it to any beneficial use he may see fit, without being obliged to return it to the stream or to preserve its purity or quantity: *Union M. & M. Co. v. Ferris*, 2 Saw. 184, citing the principal case.

PRIOR APPROPRIATOR OF WATER OF RUNNING STREAM has a superior right as against a subsequent appropriator; this right is based upon the appropriation, and not upon the ownership in the soil: *Barnes v. Sabron*, 10 Nev. 233, citing the principal case.

MERE LOCATOR ON UNSURVEYED GOVERNMENT or public lands, with nothing but possessory rights, has no riparian rights in a stream of water flowing through such land: *Lake v. Tolles*, 8 Nev. 291; *Vansickle v. Haines*, 7 Id. 289; *Covington v. Becker*, 5 Id. 283, all citing the principal case.

THE PRINCIPAL CASE came again before the court under the title of *Lobdell v. Hall*, 3 Nev. 507, where the former case is affirmed as to all points arising which were decided at the first hearing.

ZABRISKIE v. MEADE.

[2 NEVADA, 285.]

RECITALS IN SHERIFF'S DEEDS ARE CONCLUSIVE as between the parties to them and those claiming under them, and cannot be contradicted by parol evidence showing that the land was sold under a different judgment and execution than those recited in the deed.

PURCHASER AT SHERIFF'S SALE OF REAL PROPERTY under execution gets only such interest as the judgment debtor possessed. If the judgment debtor has nothing, the purchaser gets nothing, and the sale is a nullity.

THE opinion states the facts.

Aldrich and De Long, for the appellants.

J. Neely Johnson, for the respondent.

By Court, LEWIS, C. J. The judgment in this case is clearly contrary to the evidence, and must therefore be reversed; the title proven by the plaintiff upon the trial being based upon a judgment which it appears was rendered long after the premises had been conveyed by the judgment creditor to one Rawlings, from whom the defendants claim title.

If the recitals in the execution, certificate of sale, and sheriff's deed, which were introduced in evidence by the plaintiff to establish his title, be received as correct, the sheriff sold property not belonging to the judgment creditor, but which was claimed by the grantor of the defendants by virtue of a deed which had been executed and recorded nearly a year before the rendition of the judgment upon which the sale was made to the plaintiff. It appears from the record that in the

month of June, A. D. 1863, one C. C. York entered into an agreement with John Rawlings, by which he agreed to sell to him the premises in dispute for the sum of three hundred dollars, payable in monthly installments of fifty dollars; that on the twenty-third day of November, A. D. 1863, York and wife, in compliance with the agreement, executed a deed of the premises to John Rawlings; and on the twenty-second day of January, A. D. 1864, the same was recorded in the office of the county recorder of Lyon County; and on the twentieth day of April, A. D. 1865, Rawlings conveyed to the defendants in this action. This is the title made out and relied on by the defendants. The plaintiff to support his claim introduced in evidence a judgment of the probate court of Lyon County rendered on the sixteenth day of November, A. D. 1863, in his favor and against C. C. York, for the sum of \$140 and costs of suit. Upon this judgment an execution was issued on the eighteenth day of November,—two days after the rendition of the judgment,—by virtue of which some little personal property was seized and sold, but not sufficient to satisfy the judgment. On the twentieth day of January, A. D. 1864, an *alias* execution was issued and returned unsatisfied; and on the twenty-third day of November, A. D. 1864, an execution is issued in an action entitled *C. B. Zabriskie v. C. C. York*, by virtue of which the premises in dispute were sold to the plaintiff in this action. The probability is that this execution was issued upon the judgment rendered on the 16th of November, above referred to, but it recites that it is issued upon a judgment rendered on the sixteenth day of November, A. D. 1864, and it commanded the sheriff to satisfy the judgment out of the personal property of the defendant, C. C. York, and if sufficient personal property could not be found, then out of the real property belonging to the defendant on the day upon which said judgment was docketed, or at any time thereafter. The sheriff certifies that on the twenty-fifth day of November, A. D. 1864, by virtue of this execution, he levied upon and sold the premises in dispute to the plaintiff, C. B. Zabriskie, for the sum of \$226. The notice of sale also recites that the property was levied on by virtue of an execution issued upon a judgment rendered in the probate court for the county of Lyon on the sixteenth day of November, A. D. 1864. The certificate of sale also refers to a judgment rendered in November, A. D. 1864, as that under which the sale was made; and the sheriff's deed, which

was executed on the thirteenth day of July, A. D. 1865, contains the following recitals:—

“Whereas, by virtue of a writ of execution issued out of and under the seal of the probate court of the third judicial district of the state of Nevada, in and for the county of Lyon, tested the twenty-third day of November, A. D. 1864, upon a judgment recovered in said court on the sixteenth day of November, A. D. 1864, in favor of C. B. Zabriskie and against C. C. York, to the said sheriff directed and delivered, commanding him that of the personal property of the said judgment debtor in his bailiwick he should cause to be made certain moneys in the said writ specified; and if sufficient personal property of the said judgment debtor could not be found, that then he should cause the amount of said judgment to be made out of the lands, tenements, and real property belonging to him on the twenty-third day of November, A. D. 1864, or at any time afterwards”; and the deed then recites, that sufficient personal property not being found, the sheriff levied upon and sold the premises in dispute in this action to the plaintiff, C. B. Zabriskie. There seems to have been no attempt to show that the date of the rendition of the judgment as stated in the execution, notice of sale, certificate, and deed was a mistake, or to show that any other judgment than that of November 16, A. D. 1863, was ever rendered; and yet the execution, notice of sale, and deed all refer to a judgment rendered in November, A. D. 1864, a year after the sale of the premises by York to Rawlings. As the execution only authorized a levy and sale of such real property as belonged to York in November, A. D. 1864, and as the sheriff did not levy upon or convey anything else, it follows that the plaintiff got nothing by the sale, because the property sold was not the property of the defendant, nor subject to the lien of the judgment, and the sale was therefore wholly unauthorized, it being the sale of the property of Rawlings to satisfy a judgment against York. Whether the judgment referred to in the execution and deed be in fact the one rendered in November, A. D. 1863, or whether there was another judgment rendered a year later, we cannot determine from the record. In the disposition of this case, however, we must take the recitation in the deed as conclusive that there was a judgment rendered in November, A. D. 1864, and that the sale of the property in dispute was made to satisfy it. Even if there had been an attempt to correct or contradict the deed by showing that the

levy and sale were made under a judgment rendered in November, A. D. 1863, it would have been inadmissible in this action. The recitals in the sheriff's deeds are conclusive between the party making them and those claiming under the deed: *Donahue v. McNulty*, 24 Cal. 411 [85 Am. Dec. 78].

In delivering the opinion in that case, Mr. Justice Currey says: "The officer who makes a sale and executes a conveyance of land under and by virtue of a judgment and execution must necessarily make some reference in his deed to the authority under which he acted, and to the character of such authority. This is essential for the purpose of showing a transmission of the debtor's title in the property to the purchaser and grantor thereof. This is done by recital of certain facts constitutive of the officer's authority to sell and convey; and when this is done, those who claim under the deed are estopped from denying the truth of the facts recited." So in the case of *Jackson v. Sternberg*, 20 Johns. 50, it was held that parol evidence was inadmissible to contradict the recital, or show that the land was sold under a different judgment and execution than those recited in the deed.

The plaintiff could not, therefore, in this action, have been permitted to contradict the sheriff's deed, upon which he relied, by showing that the sale took place under a judgment rendered at a time different from that mentioned in the deed, even if he had been desirous of doing so. But we do not see that the correction of the deed would help the plaintiff in the least, for the execution only authorized the sheriff to sell such real property as York, the judgment debtor, was the owner of on the sixteenth day of November, A. D. 1864; and the record in this case clearly shows that long before that time York had conveyed away the premises levied on by the sheriff, and that he had no interest in them on the 10th of November, A. D. 1864; hence the sale by the sheriff was an absolute nullity, — as much so as if he had levied on the property of an entire stranger to all parties to the proceedings in which that judgment was rendered. For it is now too well settled to admit of question that a purchaser at a sale of real property under execution gets only such interest as the debtor possessed at the time of the lien of the judgment. If the judgment debtor has nothing, the purchaser gets nothing: *Boggs v. Hargrave*, 16 Cal. 559 [76 Am. Dec. 561].

In this case, York, the judgment debtor, had no interest in the property on the 16th of November, A. D. 1864, the time

stated in the execution when judgment was rendered, and therefore the purchaser, Zabriskie, gets nothing by the sale.

Judgment reversed.

BROSNAN, J., did not participate in this decision.

RECITALS IN SHERIFF'S DEED, conclusiveness of, and admissibility of parol evidence to contradict: *Donahue v. McNulty*, 85 Am. Dec. 78, and note 84; *Leshey v. Gardner*, 38 Id. 764.

PURCHASER OF LAND AT EXECUTION SALE acquires only such title as the execution debtor had: *Gingrich v. Foltz*, 57 Am. Dec. 631, and note 634; *Polk v. Gallant*, 34 Id. 410; *Campbell v. Lowe*, 66 Id. 339. *Caveat emptor* is the rule at such sales: *Lang's Heirs v. Waring*, 60 Id. 533, and note 539; *Boggs v. Fowler*, 76 Id. 561; *Walbridge v. Day*, 83 Id. 227, and note.

SHARON v. SHAW.

[2 NEVADA, 299.]

DELIVERY OF POSSESSION OF PERSONALTY IS SUFFICIENT as against subsequent attaching creditors of the vendor where the latter executes a deed of certain realty, followed by a bill of sale of the personalty thereon, and delivers possession of everything about the premises to the vendee, and surrenders the keys to the agent of the latter. In such case, a removal of the personal property from the premises is not necessary.

REGISTRY OF DEED AS NOTICE OF SALE OF PERSONALTY. — Where the vendor executes a deed of realty, followed by a bill of sale of the personal property thereon, and delivers possession of whole to the vendee, the recordation of the deed by the latter is notice to subsequent attaching creditors of the vendor of the sale and transfer of the real and personal property.

DELIVERY OF POSSESSION OF PERSONALTY NOT SUFFICIENT as against subsequent attaching creditors. Where a vendor executes a deed of real estate, and also a bill of sale of the personal property thereon, but includes in such bill of sale other personalty not on the land conveyed, the latter-named personal property, without further change of possession, does not vest in the vendee as against subsequent attaching creditors of the vendor.

MERE NOTIFICATION OF SERVANT IN CHARGE that personal property has been sold, accompanied with a request by the purchaser to continue in his employment, is not such delivery or change of possession as will vest the property in him as against subsequent attaching creditors of the party from whom he bought.

THE opinion contains the facts.

Crittenden and Sunderland, for the appellant.

Williams and Bixler, for the respondent.

By Court, LEWIS, C. J. This action was brought for the purpose of recovering possession of certain personal property

from the defendant, who is the sheriff of the county of Lyon, and who justifies under a writ of attachment issued out of the district court of his county. The plaintiff, claiming title from Tregloan, the person against whom the attachment was issued, introduced in evidence a bill of sale from him of all the personal property now in controversy, dated October 31, A. D. 1865, and also a deed bearing date June 1, A. D. 1865, by which certain real estate (upon which a portion of the personal property was situated) was conveyed to the plaintiff.

It was also proven at the trial that a large portion of the personal property was kept in the cellar of the boarding-house, which, it appears, was not located on the premises conveyed by the deed of June 1st. This deed, though executed on the 1st of June, was not placed on record until the night of the thirty-first day of October, when the bill of sale was executed.

The plaintiff, Mr. Sharon, gives as a reason for this delay that the deed was delivered to him with the understanding that at any time when he might consider the bank for which he was acting not entirely secure the deed might be placed upon record. On the thirty-first day of October, the grantor, Mr. Tregloan, informed the plaintiff that he did not think he could discharge his indebtedness to the bank, and offered to surrender all his property in discharge of it; this offer was accepted, the bill of sale executed in compliance with this understanding, and the same evening the deed of the real estate was placed upon record. The deed conveyed the premises upon which the Swansea mill is located, together with the mill, batteries, engines, boilers, pans, and all other machinery belonging or appertaining thereto. It appears that there was a boarding-house owned and conducted by Tregloan in connection with this mill, but not located on the premises conveyed by the deed. Much of the personal property transferred by the bill of sale was kept in the cellar of this boarding-house; the balance was kept on the premises conveyed by the deed.

On the morning after the execution of the bill of sale and the recordation of the deed, the plaintiff, by his agent, took possession of the premises. The agent also informed the persons who were employed at the boarding-house of the sale, and engaged them on behalf of the plaintiff to remain in his employ.

Tregloan delivered a bunch of keys to Johns, the plaintiff's

agent, among which was a key to a building occupied as the office; but it appears that the key to the cellar of the boarding-house, where much of the property in question was kept, was not delivered with the others, it being in the possession of Mrs. Washburn, who was employed to take charge of the cooking for the employees of the mill. Nothing was done towards taking possession of the personal property in the boarding-house cellar, except that Johns informed Mrs. Washburn of the sale, and requested her to remain as the employee of the plaintiff. On the morning of November 1st, after the delivery of possession of the premises, the sheriff levied upon the personal property in question, a portion of which was in the office, some of it in the mill, and, as before stated, much of it in the cellar of the boarding-house. Upon the trial, the defendant claimed that there had been no such delivery of the possession of the property as would transfer the title to the plaintiff as against the creditors of Tregloan. The verdict and judgment were for the defendant. Plaintiff appeals.

The principal question presented for consideration in this court is, whether the delivery of the personal property by Tregloan to the plaintiff was sufficient to meet the requirements of the statute of frauds. Our conclusion is, that the delivery of that portion of the property transferred by the bill of sale which was in the mill and office or on the premises conveyed by the deed fully met the requirements of the law. The bill of sale passed the right of possession, and the deed and the subsequent surrender of the possession of the real estate upon which the personal property was kept was a complete delivery of the possession of that personal property. We are unable to see what further delivery or change of possession could have taken place. The plaintiff having received a conveyance of the real estate whereon all the personal property was needed for use, it would be a harsh construction of the law to hold that a complete delivery could not take place without a removal of it from the place where it had been kept by the vendor of the plaintiff. There was not only a transfer of the right of possession by means of the deed and bill of sale, but the plaintiff's vendor surrendered possession of everything about the premises, and delivered the keys to the agent of Mr. Sharon. Thus the title and the possession were passed, and the deed, which was placed upon record before the levy by the sheriff, imparted notice to the world that the premises upon which the personal property was kept had been conveyed to

the plaintiff. This, together with the actual possession of the premises by the plaintiff, would be sufficient to notify third parties of the transfer. There was not only the sale of the personal property and a delivery of the possession, but there were all the outward evidences of such sale which the circumstances of the case admitted of. The conveyance and delivery of the possession of the real estate and the recordation of the deed operated precisely the same as a removal of the personal property from the premises entirely.

In our opinion, it is a matter of no consequence in the decision of this question whether the deed from Tregloan to Sharon would in equity be considered a mortgage. The deed is absolute on its face, and a delivery of possession of the real estate took place under it. Whether that possession was obtained by virtue of a deed absolute, mortgage, or lease, the result here must be the same.

As to the property kept in the cellar of the boarding-house, there seems to have been no such delivery and change of possession as the law contemplates. That portion of the property was not on the premises conveyed by the deed, and the key to the cellar where it was kept was not delivered with the others, but remained in the possession of the servant until it was taken from her by the sheriff. The boarding-house, not being included in the deed of conveyance, of course continued to be the property of Tregloan. The servant which he had employed before the sale continued in possession of the house and the personal property in the cellar. There was no change, or apparent change, of the possession of that portion of the personal property. Everything remained the same after as before the sale, and the fact that that house had not been conveyed by the deed would of itself raise the presumption that no change had taken place as to it or the property in it. As to that portion of the property, nothing was done towards a change of possession, except the notification of the servant who had charge of it that it had been sold, and the employment of her in the same capacity by the plaintiff.

The authorities are uniform that that would not be such delivery and change of possession as is required by the law. So it was held by this court in the case of *Doake v. Brubaker*, 1 Nev. 218, and by the supreme court of California in the case of *Hurlburt v. Bogardus*, 10 Cal. 519:

The transcript does not purport to contain all the evidence adduced at the trial, but from that which is presented it is

shown affirmatively that there was not a sufficient delivery of that portion of the property which was in the boarding-house at the time of the levy by the sheriff to transfer the title to the plaintiff.

So far as the question of fraud in the conveyance and sale to the plaintiff is concerned, we find nothing in the record which would in any manner justify the jury in arriving at the conclusion that any existed.

The judgment must therefore be reversed, and a new trial granted.

BROENAN, J., did not participate in this decision.

SALE OF PERSONAL PROPERTY IS COMPLETE, and no subsequent formal delivery is necessary, where, from the date of the bill of sale, the property continued to be on land or in buildings in the exclusive possession and control of the vendee: *Nichols v. Patten*, 36 Am. Dec. 713.

GENERALLY, IN SALE OF PERSONAL PROPERTY, delivery of possession is absolutely necessary to its validity as against creditors of the vendor: *Jarvis v. Davis*, 61 Am. Dec. 166; *Whitney v. Stark*, 68 Id. 360; *Monroe v. Hussey*, 75 Id. 552; *Hall and Loney v. Richardson*, 77 Id. 303; *Rice v. Courtis*, 78 Id. 597.

MITCHELL v. BROMBERGER.

[2 NEVADA, 345.]

RULE THAT ATTORNEY OR COUNSELOR CANNOT, without the consent of his client, be compelled to disclose any fact communicated by the client to him, or advice given in the course of professional employment, has been adopted in Nevada, but it will not be so enforced as to allow the client to take advantage of it to the prejudice of the attorney, or so as to deprive the latter from obtaining or defending his rights.

WHEN DISCLOSURE OF PRIVILEGED COMMUNICATIONS becomes necessary to the protection of the attorney's rights, in a suit between him and his client, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his protection.

JUDGMENT WILL NOT BE SET ASIDE ON APPEAL for errors committed at the trial which it appears were not prejudicial to appellant.

IN ABSENCE OF POSITIVE ERROR SHOWN BY RECORD ON APPEAL, it will be presumed that the ruling of the lower court in refusing to retax costs was correct. A statement of facts in the brief of counsel will not supply the deficiency in the record.

THE opinion states the facts.

Perley and De Long, for the appellant.

Mitchell and Hundley, in propria persona.

By Court, LEWIS, C. J. The plaintiffs, who are practicing lawyers in Virginia City, bring this action to recover the sum of \$1,037, which it is claimed is due them from the defendant for professional services rendered by them some time during the year 1865. The defendant puts in issue all the material allegations of the complaint by denying the indebtedness; denying that he ever employed the plaintiffs, or either of them, as his attorneys or counselors, or in any other capacity; and that they, or either of them, have ever acted as his attorneys or counselors, or done or performed any labor of any character whatever for him. Upon the trial, the plaintiff Mitchell testified on his own behalf, and stated fully the manner in which he and his partner were employed by the defendant; detailed all the services rendered by them, and also stated the counsel which they gave the defendant in the matter in which were employed.

The defendant objected to and moved to strike out a large portion of this testimony, upon the ground that it was information obtained by the plaintiffs whilst acting as counsel for him, and that it bore the character of privileged communication, which the plaintiffs had no right to disclose without his consent. The court below refused to strike it out. Of this ruling the defendant complains, assigns it as error, and relies upon it here as the principal ground for reversing the judgment below.

It is undeniably a general rule of the law of evidence that an attorney or counselor cannot, without the consent of his client, be compelled to disclose any fact which may have been communicated to him by his client solely for the purpose of obtaining his professional assistance or advice; and section 344 of the practice act of this state explicitly adopts this rule in the following language: "An attorney or counselor shall not, without the consent of his client, be examined as a witness to any communication made by the client to him, or his advice given therein, in the course of professional employment."

In the complicated affairs and relations of life, the counsel and assistance of those learned in the law often becomes necessary, and to obtain it men are frequently forced to make disclosures which their welfare and sometimes their lives make it necessary to be kept secret. Hence, for the benefit and protection of the client, the law places the seal of secrecy upon all communications made to the attorney in the course of his professional employment, and the courts are expressly

prohibited from examining him as a witness upon any facts which may have come to his knowledge through the medium of such employment.

But the claims of justice dictate some exceptions to this rule. It would be a manifest injustice to allow the client to take advantage of it to the prejudice of his attorney; or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. It is therefore held that in such cases he is exempted from the obligations of secrecy: *Rochester City Bank v. Snydam*, 5 How. Pr. 254. In the opinion in that case, Mr. Justice Selden says: "But independent of this reasoning, and admitting all the previous conclusions to be erroneous, there is still another ground upon which, in my judgment, this motion must be denied. I think that where the attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his personal rights, he must of necessity and in reason be exempted from the obligations of secrecy. For instance: suppose a client makes a private and confidential statement of facts by letter to an attorney employed to conduct a suit, inducing him to take a particular course with the suit, which proves eminently disastrous, and he is afterwards prosecuted by his client for unskillful management of the cause,—can it be claimed that he cannot produce the letter in his justification? I apprehend not."

We think it safe to say that whenever in a suit between the attorney and client the disclosure of privileged communications becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. In this case, the appellant complains that a large portion of the plaintiff Mitchell's testimony consisted of facts which were communicated to him whilst he was acting as the attorney of the defendant, and the disclosure of which was not necessary for the protection of his own rights. If we agreed with counsel for appellant upon that fact, the judgment below could not, in our opinion, be reversed, for the evidence so improperly admitted is not of a character which could have injured the defendant in this case. That the judgment of an inferior court will not be set aside on appeal for errors committed on the trial which it appears could not have prejudiced the appellant is a proposition thoroughly

settled by the authorities. The defendant in this case, however, claims that the evidence improperly admitted presented him in a false light before the jury. It disclosed the fact to them that whilst he was in failing circumstances he wished to give his brother a preference over his other creditors by confessing judgment in his favor. Although many such facts were disclosed by the evidence of Mitchell, we see nothing in it which should have a tendency to so prejudice the jury against the defendant that they would be influenced by it in their verdict in this case. Taking all the testimony together, we do not see that the defendant endeavored to do anything dishonest or very improper in the confession of the judgment referred to; and even if he had, it is impossible to believe that it could have influenced the jury in making up their verdict in this case. The plaintiffs are suing for a certain sum of money which they claim to be due them for services rendered for the defendant; how the fact that the defendant was desirous of preferring some of his creditors over others could have induced the jury to give a larger verdict for the plaintiffs, who acted as his attorneys and counselors in the whole matter, than they would otherwise have done, is not easily understood. Indeed, to conclude that they did so would be unnatural and contrary to our understanding of the motives which govern the actions of men. The defendant's disposition towards his creditors could not in any way increase or diminish the value of the plaintiffs' services, and we cannot conclude that the jurors were influenced by any such circumstances without questioning their honesty and good sense. It is evident, therefore, that the defendant was not injured in this case by the admission of the testimony complained of.

— This case has been twice tried, the plaintiffs recovering judgment both times; and we are satisfied that another trial would not and indeed ought not to change the result.

Another error complained of by the appellant is that the court below refused to relax the costs upon a motion for that purpose made by him. What errors in the cost bill the appellant complains of do not appear in the record.

Every item seems regular on the face of the bill. We are therefore unable to determine from the transcript whether the court below ruled correctly or not, but in the absence of positive error shown we must presume that the ruling was correct. Counsel for appellant mentions the error which they complain of in their brief, but that is not sufficient here. The record

must show the error if any exists. A statement of facts in the brief of counsel will not supply a deficiency in the record. Had it appeared that the one-hundred-dollar item was improperly charged, we could not hesitate to hold the ruling of the court below incorrect. But how are we to ascertain whether it is a legitimate charge or not? Most assuredly only by the record in this case. We cannot go out of that record for facts upon which to determine the conditions of the ruling below, and as we have stated before, that record discloses no error.

The judgment of the district court is therefore affirmed, and it is so ordered.

PROFESSIONAL COMMUNICATIONS, WHEN ARE PRIVILEGED: *Gallagher v. Wilkameon*, 83 Am. Dec. 114; *Whiting v. Barney*, 86 Id. 385, and citations in notes to these cases.

ERROR NOT PREJUDICIAL IS NO GROUND FOR REVERSAL OF JUDGMENT: *Saltonstall v. Riley*, 65 Am. Dec. 335, and note; *Lucas v. New Bedford etc. R. R. Co.*, 66 Id. 406, and note; *Williams v. Brickell*, 75 Id. 83, and note; *Warner v. Whittaker*, 72 Id. 65; *Wickersham v. Orr*, 74 Id. 348; *Buckner v. Bush*, 85 Id. 634; *Tyler v. Green*, 87 Id. 130.

APPELLATE COURT WILL INTERFERE WITH JUDGMENTS of lower courts only for errors appearing from the record on appeal: *Backus v. Clark*, 83 Am. Dec. 437; *Wixon v. Bear River etc. Mining Co.*, 85 Id. 69, and notes to these cases. Error is never presumed, but must affirmatively appear: *O'Malley v. Dorn*, 73 Id. 403, note 410; *Beard v. Murphy*, 86 Id. 693.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

WOODBURY v. WOODBURY.

[47 NEW HAMPSHIRE, 11.]

WHERE TWO PERSONS GIVE THEIR NOTE FOR LAND JOINTLY CONVEYED TO THEM, and afterwards one of them conveys his interest to the other, who, the payee assenting to the arrangement, assumes the payment of the whole note, the payee can, in an action for money had and received, recover the whole amount of the note against the party who has thus assumed its payment.

WHERE NAME OF PAYEE OF NOTE IS INDORSED THEREON IN HIS PRESENCE, at his request, and by his direction, by another person, the indorsement is as valid as if written by such payee's own hand.

EXECUTOR WHO SUES IN HIS OWN NAME, BUT NOT AS EXECUTOR, cannot recover on a note payable to his testator, but not indorsed by him.

WHERE, AFTER DEFENDANT HAS BEEN DEFAULTED, SUBSEQUENT ATTACHING CREDITOR IS ALLOWED TO DEFEND, he may be allowed a claim of the defendant against the plaintiff in offset to the plaintiff's claim, where there is no other claim on which either the plaintiff or defendant can desire to make application of such offset.

PARTY ELECTING TO RESCIND CONTRACT MUST RESTORE WHAT HE HAS RECEIVED under it, or pay its value, as a prerequisite condition.

VENDOR MAY ELECT TO TREAT EITHER AS TRESPASSER OR AS TENANT AT WILL one who with his consent enters upon land under a contract of purchase, but fails to pay as he agreed; and he may maintain against him either trespass or *assumpsit* for use and occupation.

ASSUMPSIT. The declaration alleged that the plaintiff, John Woodbury, conveyed to the defendant, Peter Woodbury, and one Elias H. Woodbury, certain lands, in part consideration for which they gave him their note for \$275; that afterwards Elias H. conveyed to Peter his interest in the premises, and plaintiff discharged and released said Elias H. from all liability on said note, and agreed to take Peter as paymaster

therefor; that Peter promised to pay said note. There was also a count for money had and received. Under these counts the plaintiff specified the three notes mentioned in the opinion. The defendant was defaulted, but one Webster, a subsequent attaching creditor, obtained leave to appear, and pleaded the general issue and the statute of limitations, with an offset for the rent of a certain house and lot which the plaintiff had agreed to purchase from the defendant, but for which nothing had ever been paid by the plaintiff, and no deed ever executed. Other facts appear from the opinion.

Shirley, for the plaintiff.

Flanders, for Webster.

By Court, SARGENT, J. At the trial, the court found that \$200 was the amount due upon the \$275 note if anything could properly be recovered. Can anything be recovered upon it? The contract was clearly executory. Plaintiff was to purchase the premises, and was to pay for the same as agreed, and defendant was to convey. It was all to be done in the future. The note was not paid by that arrangement, but was to be paid in a certain way, but never was. The note was not paid, and has not been since.

No question arises here whether there has been such part performance of the contract by the plaintiff's having possession of the premises as that the whole contract would be specifically enforced in equity. No one here is seeking for a specific performance. The plaintiff, by bringing his suit to recover pay on the note, has elected on his part to rescind and repudiate this contract; and the creditor, who appears to defend, instead of relying upon the contract and seeking to enforce it, is claiming rent for the use and occupation of the premises since the contract of sale, which he could only do on the ground that the contract of sale has been rescinded.

Two hundred dollars of the note therefore remains unpaid. That amount may be recovered here under the arrangement and contract set up in the special count, and all this evidence would also be admissible under the count for money had and received, upon the authority of *Warren v. Batchelder*, 16 N. H. 580; *Mathewson v. Powder Works*, 44 Id. 292; *Kent v. Watson*, 46 Id. 148, and cases there cited.

The plaintiff may therefore recover two hundred dollars on this note, unless the statute of limitations, which is pleaded in this case, shall be found to interfere. The note was dated

January 27, 1851, and had not run six years at the time of the arrangement of March 14, 1856, when the case finds that there remained due on the same two hundred dollars, and also that Peter was by his contract to receive it in payment of two hundred dollars, or instead of that amount of cash towards the land, which we think would be competent as tending to show an acknowledgment on the part of Peter that there was then that amount honestly due which he was liable and willing to pay, and in fact promised to pay in a particular way by conveying the land, but that contract he has not performed. He has not paid the note in that way, as he agreed to do, and the fact that that contract is now rescinded by which it was to be paid in a particular way does not nullify the effect of his admission, which is fairly deducible from his conduct, that there was then two hundred dollars due which he was liable and willing to pay, and this would be a sufficient acknowledgment to take the case out of the statute of limitations, and prevent that from operating as a bar for six years from that time. In 1859, the defendant went to California, and has never returned, and this writ is dated August 13, 1860.

We think the plaintiff may also recover upon the twenty-three-dollar note, although the indorsement of the payee's name on the back of the note was written by the plaintiff, the indorsee. The case finds that this note was actually sold by Betsey Wells to this plaintiff, and that he indorsed her name on the back of the same in the presence, at the request, and by the direction of said Betsey, for the purpose of transferring the note to the plaintiff, and that she delivered the note to him for the same purpose. No question is here raised about the good faith of the transaction. It was her own act, if done in her presence and by her direction, though done by another, as much as though she had written her name herself: *Kidder v. Prescott*, 24 N. H. 267; *Hanson v. Rowe*, 26 Id. 327; *Cushman v. Wooster*, 45 Id. 410.

The fifty-four-dollar note cannot be recovered in this suit. It is payable to Anna Wells or order, and not indorsed by her in her lifetime, nor by her executor or legal representative since her decease; and as it could only be recovered in her name while she lived, so since her death it can only be recovered in the name of her executor, no matter in whom the equitable title to it may be. John Woodbury, Jr., is not the representative of Anna Wells, though John Woodbury, Jr., executor of the last will, etc., of Anna Wells, may be her legal

representative, and as such he might have recovered on this note, or as such he might have indorsed the note so that John Woodbury, Jr., might have recovered upon it in his private capacity. But until there is such indorsement, the note cannot be recovered in a suit at law in the name of any other person than that of the executor suing in his official capacity: *Currier v. Hodgdon*, 3 N. H. 82; *Thompson v. Emery*, 27 Id. 269; 1 *Parsons on Bills*, 159; *Clark v. Sigourney*, 17 Conn. 510; *Dix v. Cobb*, 4 Mass. 511; *Crocker v. Whitney*, 10 Id. 316; *Wheeler v. Wheeler*, 9 Cow. 34; *Story on Promissory Notes*, sec. 120; *Amherst Academy v. Cowles*, 7 Pick. 427-439; *Grover v. Grover*, 24 Id. 261 [35 Am. Dec. 819]; *Bates v. Kempton*, 7 Gray, 382; *Smalley v. Wight*, 44 Me. 442 [69 Am. Dec. 112]; *Rawlinson v. Stone*, 3 Wils. 1; *Rand v. Hubbard*, 4 Met. 252.

Can the offset be recovered in this suit? If this were the case of an ordinary offset of a matter of account in a case where there were other dealings between the parties not involved in this suit, it might be doubtful whether the subsequent attaching creditor in this suit could file this offset and insist upon its allowance in this particular case. The defendant might prefer to have the offset allowed on some other claim of the plaintiff's besides the one in this suit, or it may have been arranged that the offset should apply on some other claim, in which case the subsequent attaching creditor would have no right to control it or to divert its application from the particular manner intended or agreed on by the parties of record. But in this case the nature of the transaction and the character of the offset would seem to indicate that it should be applied in this particular way.

The party rescinding a contract, if he has received any benefit from it, should restore or make compensation for the benefit received, so as to put the other party in as good condition as before. And as plaintiff elects to rescind the contract in this case, and as he has occupied the premises under the contract, it is proper that the compensation for the use of the premises, if it is to be allowed at all, should be allowed in this suit, which depends so much upon that contract and its rescission. And then again, the case finds that all other dealings between these parties were settled, except what related to and were connected with the contract for the purchase of this land, so that there is no other claim on which either the plaintiff or defendant can desire to make the application of this offset, if allowed at all, except the one in this suit. Under all these circumstances,

we see no reason why this creditor, who has obtained leave to appear and defend this suit, may not insist on having this offset applied in this case, if it can be allowed at all, any more than that he should not be allowed to insist on a payment by defendant made subsequent to the contract, which he clearly might do.

The question then arises, whether a claim for use and occupation can properly be made in this case for the use of the premises since the contract to purchase was made. Upon the authority of *Clough v. Hosford*, 6 N. H. 233, such claim may clearly be maintained. This case finds that neither party is in fault more than the other, that plaintiff and defendant were brothers, and were both willing to perform their part of the contract at any time, but both procrastinated an unreasonable time, until either might properly have rescinded the contract; but the fact that the defendant was in debt made it necessary for the plaintiff to rescind it in order to save either the land or his money, and he has elected to rescind, and attached the land as the defendant's, and there is nothing inequitable in holding that he should allow what the use and occupation of the premises were reasonably worth to him. If it had been the defendant's sole fault that the contract was not carried out, he could have no claim for the rent. But the plaintiff having taken the initiative and rescinded the contract, he is liable properly either for the use and occupation or as a trespasser.

Plaintiff claims that he can only be liable as a trespasser, and that the case of *Clough v. Hosford*, *supra*, has been overruled by *Page v. Babbit*, 21 N. H. 389, and *Smith v. Smith*, 43 Id. 538. But we do not understand the effect of these cases to be what the plaintiff claims.

In this case, the defendant is not complaining that the plaintiff has not paid sooner, nor is he here seeking to enforce the contract for the sale of the land. The plaintiff has found it necessary to rescind the contract, or lose his note and the land also. And when he elected to rescind, he must restore what he has received under the contract, or pay its value as a prerequisite condition. Defendant does not object to this, and only asks that plaintiff pay what is reasonable for the use of the premises while he has occupied them under the contract. Of this the plaintiff cannot reasonably complain.

But there is another ground on which a distinction might be made between this case and *Clough v. Hosford*, *supra*, if it

were necessary; which is, that the plaintiff, as the case finds, was at the time of the contract of purchase and of sale, and had been for several years before, in possession of the same premises under a contract to pay rent, which rent was adjusted in the settlement of March 14, 1856. Of course, there was no original entry upon the premises under the contract to purchase, for the plaintiff was already in possession under a different contract. And even though it should be held where a person is permitted to enter upon land under a contract to purchase which he himself avoids by refusing to pay that he is in without right and as a trespasser, just as though he had entered without any contract or any permission, yet here, where the contract of sale is avoided, the plaintiff would be left in possession, just as though no such contract of sale had been made; and in this case that would leave the plaintiff in possession of the premises under the contract to pay rent as before. And then the claim for use and occupation or for rent would be the proper form of remedy. But we do not think it necessary to put this case upon that ground.

We are aware that there is a great weight of authority that an action of trespass, and not *assumpsit* for use and occupation, can be maintained where an individual enters upon land under a contract to purchase, and then fails to pay, and refuses to perform the contract, and the other party is without fault. In such case he may no doubt be properly held to be a trespasser, and guilty of bad faith as well as trespass: *Smith v. Stewart*, 6 Johns. 46 [5 Am. Dec. 186]; *Bancroft v. Wardwell*, 13 Id. 489 [7 Am. Dec. 396]; *Abeel v. Radcliff*, 15 Id. 508; *Hall v. Southmayd*, 15 Barb. 36; *Little v. Libbey*, 2 Me. 242 [11 Am. Dec. 68]; *Wyman v. Hook*, 2 Id. 337; *Keyes v. Hill*, 30 Vt. 762; *Stacy v. Vermont C. R. R.*, 32 Id. 551; *Sylvester v. Ralston*, 31 Barb. 286,—are some of the authorities that hold that trespass, and not *assumpsit* for use and occupation, is the proper remedy in such a case.

The cases in New York are the leading cases where the common-law remedy of ejectment and trespass for mesne profits was adopted with the English statutes upon that subject, and where these remedies were in common use. Now, where ejectment is the remedy used to recover possession of lands occupied by another, it follows that trespass must be brought to recover the mesne profits. In ejectment the plaintiff's title has relation back to the time when his right of entry first accrued, and he is considered for all purposes of the

recovery to have been in possession from that time. The possession of any one who holds him out during that time is consequently wrongful, and by the common law he may bring an action of trespass to recover damages for the mesne profits. But use and occupation will not lie for rents and profits after an ejectment accruing subsequent to the day of the demise alleged in the declaration, as use and occupation imply a contract, and the plaintiff, having in the ejectment treated the defendant as a trespasser at a period subsequent to the demise, is estopped from also treating him as a tenant, and bringing an action for use and occupation, the one position being manifestly inconsistent with the other: Taylor on Landlord and Tenant, sec. 710.

But it is held in Massachusetts that *assumpsit* for use and occupation will lie where the purchaser has entered upon land under a parol contract of sale which had failed, and that when there has been such entry and occupation by the purchaser who has failed to complete the purchase, such possession constituted a tenancy at will, and *assumpsit* will lie: *Codman v. Jenkins*, 14 Mass. 93. *Gould v. Thompson*, 4 Met. 224, is a leading case which was fully discussed and considered, and where the New York cases and others of the same import were cited in argument; but it was held, Shaw, C. J., delivering the opinion of the court, that where one enters on land to use and occupy it with the consent and permission of the owner, but for no definite time, he is tenant at will; that in the case at bar the possession was given with the expectation that a deed would be given, but it was uncertain when it would be given, or whether it would be given at all; that none in fact was given or could be in that case, and that the purchaser was in the mean time tenant at will of the owner. There are various other authorities sustaining this view of the subject: *Hall v. Vaughan*, 6 Price, 157; *Boston v. Binney*, 11 Pick. 1; 2 Bouv. Inst., sec. 1810; *Doe v. Jackson*, 1 Barn. & C. 455; *Right v. Beard*, 13 East, 210; 4 Kent's Com. 114; *Doe v. Miller*, 5 Car. & P. 595; *Keay v. Goodwin*, 16 Mass. 4; *Theological Institute v. Barbour*, 4 Gray, 329; *Foley v. Wyeth*, 2 Allen, 131 [79 Am. Dec. 771]; *Lyford v. Putnam*, 35 N. H. 563; *Wendall v. Johnson*, 8 Id. 220 [29 Am. Dec. 648]; *Proprietors etc. v. McFarland*, 12 Mass. 324; Taylor on Landlord and Tenant, secs. 57, 60, 63.

In *Clough v. Hosford*, *supra*, it is said that a person entering on land on a contract to purchase, and afterwards refusing to comply with his agreement, may be prosecuted in an action

of trespass, or *assumpsit* for use and occupation, at the owner's election. In this statement of the general principle we fully concur, but not precisely upon the grounds stated in the opinion in that case, viz., that trespass would lie, and that the plaintiff might waive the tort and bring *assumpsit*, in such a case where the defendant had had the use or avails of the plaintiff's property. This waiving of a tort and bringing *assumpsit* was formerly held to be good law, but the more recent decisions are the other way, in which it is held that the extent of this doctrine is that where the wrong-doer has sold the property unlawfully taken or detained, and received the money for it, the owner may waive the tort and ratify the sale and maintain *assumpsit* for money had and received to the use of such owner: *Jones v. Hoar*, 5 Pick. 285; *Glass Co. v. Walcott*, 2 Allen, 277; *Mann v. Locke*, 11 N. H. 246; *Smith v. Smith*, 43 Id. 536.

But this would seem to be a case where the plaintiff may have an election of actions. The purchaser went into possession by the consent and license of the vendor, to hold under him till a deed should be given, and he enjoyed a beneficial use of the premises; but if the purchaser refuses to complete the contract, the vendor has the right, we think, to treat him as a trespasser, or as a tenant at will, at his election. If the deed had been given pursuant to the parol agreement, then the tenancy at will would have been merged in the executed contract, which would relate back to the time that possession was given under the agreement, and in that case no action of trespass could arise.

Where a man under a contract of purchase, by permission of the vendor, enters upon the premises and enjoys a beneficial use, and afterwards fails to complete the purchase, it is doing no more violence to the real contract or to the facts in the case to hold that the purchaser was during this time a tenant at will, and that the law implies a promise to pay reasonable rent for such beneficial use where the real contract is rescinded, than it is to hold that the purchaser originally with force and arms broke and entered the plaintiff's close, for such was in no sense the fact. Instead, therefore, of the plaintiff's waiving the tort, there was in fact no tort to waive. But the plaintiff by refusing to perform his contract has put himself in a position where he may be properly treated as a trespasser or as a tenant, with equal propriety, at the election of the owner, having placed himself in that position by his own wrong act subsequent to his entry, though in fact he did not

enter either as a trespasser or as a tenant. We think, therefore, that the decision in *Clough v. Hosford*, *supra*, was clearly right, not for the reason there stated, that the tort might be waived and *assumpsit* brought, but because there is an election of remedies where the owner may treat the occupant either as a tenant or as a trespasser, when in fact he was neither, but where in consequence of his own wrong act he may readily by a fiction of law be converted into either: *Alton v. Pickering*, 9 N. H. 494.

There are many cases where a person may have an election of actions. A mortgagee may treat every person whom he finds in possession of the mortgaged premises, whose title is not good as against him, as a wrong-doer and a disseisor, at his election, and no disseisor can qualify his wrong by alleging that he is seised of a less estate than a fee: *Wilson v. Webster*, 6 N. H. 419; *Toule v. Ayer*, 8 Id. 57; *Wheeler v. Bates*, 21 Id. 460; *Tappan v. Tappan*, 31 Id. 41; *Stark v. Brown*, 40 Id. 345. So a case of bailment of goods presents a familiar instance of the election of remedies. If the goods are wrongfully applied, *assumpsit* will lie for a breach of the implied promise, or trover for a conversion: *Govett v. Radnidge*, 3 East, 62-70; *Murray v. Burling*, 10 Johns. 172, 176; *Lockwood v. Bull*, 1 Cow. 322, 334. So a party may often elect between debt and covenant: 1 Ch. Pl. 117. So also if after the expiration of a term the tenant continues to hold over without paying rent, the landlord may elect to treat him as a trespasser or as a tenant: *Taylor on Landlord and Tenant*, sec. 22. This last case is quite analogous to the one we are now considering.

Perhaps one reason why the law has been holden differently in Massachusetts and New Hampshire from the holding in New York may be that in the two former the action of ejectment is not now and has not been for many years in use. Jackson, in the preface to his work on real actions, page 1, after alluding to the fact that it is more than three centuries since the common real actions have been almost wholly disused in England, their place being supplied by the action of ejectment, says: "The action of ejectment has never been in common use in this part of our country; the writ of entry on disseisin being found a more convenient and effectual remedy, and being maintainable in every case in which ejectment would lie."

Now, however it may have been in Massachusetts, we know that the writ of ejectment was in common use in the province

of New Hampshire before the Revolution: See Belknap's History of New Hampshire, Farmer's edition, pp. 159, 163, 165. And we can hardly doubt that the same was the case in Massachusetts; for though there may be no case reported in the printed reports of that state, as there is none in the printed reports of our own, where ejectment was the remedy made use of, yet the action of ejectment is spoken of, and would seem to be referred to as a remedy well known in Massachusetts, in the following cases: *Commonwealth v. Peters*, 2 Mass. 127; *Perley v. Chandler*, 6 Id. 456 [4 Am. Dec. 159]; *Adams v. Emerson*, 6 Pick. 58; *Otis v. Smith*, 9 Id. 297.

Ejectment was early recognized as a legal remedy in this state: N. H. Laws, 1815, p. 105; Act of 1791, also p. 108; Act of 1797; N. H. Laws, 1830, 95, 96, Act of 1829. So in the Revised Statutes, c. 182, sec. 8, the form of the writ in ejectment is prescribed. But in practice the action of ejectment has not been used in this state for many years, and perhaps for a still longer term in Massachusetts. Had this action continued in common use in these two states as it did in New York, there would have been the same necessity for bringing trespass for the mesne profits as we have already seen.

But as it has long been disused, though still recognized in this state as a legal and proper form of action, there has been no necessity of adhering to the action of trespass in cases like this, where it is found that *assumpsit* for use and occupation is quite as appropriate and as equitable a remedy as the other.

Plaintiff will have judgment for \$200 on the \$275 note, with interest from March 14, 1856; also on the \$23 note, with interest from its date, deducting \$120 for the use and occupation of the premises, with interest from date of writ.

Judgment for plaintiff.

RESCISSION OF CONTRACT, WHAT NECESSARY FOR: *Patten's Appeal*, 84 Am. Dec. 479, and prior cases cited in the note 484.

EXECUTOR MUST DECLARE IN HIS REPRESENTATIVE CHARACTER when he sues on a cause of action which accrued in the lifetime of his testator: *Lawson's Ex'r v. Lawson*, 80 Am. Dec. 702, and note 705.

SET-OFF GENERALLY APPLIES ONLY TO MUTUAL DEBTS between plaintiff and defendant: See *Trafford v. Hall*, 82 Am. Dec. 589, and note 592; *Downs v. Jackson*, 85 Id. 289, note 291; and the note to *Gregg v. James*, 12 Id. 154, 155.

RELATION TO VENDOR OF VENDEE IN POSSESSION who fails to comply with his contract, and his liability to an action for use and occupation: See *Patterson v. Stoddard*, 74 Am. Dec. 490, and note 491; *Relfe v. Relfe*, 73 Id. 467, and note 469; *Redmond v. Bowles*, 73 Id. 153; *Dwight v. Cutler*, 64 Id. 105, and note 113; *Foley v. Wyeth*, 79 Id. 771.

STATE v. STAPLES.

[47 NEW HAMPSHIRE, 112.]

TESTIMONY HAVING BUT SLIGHT BEARING UPON CONTROLLING EVIDENCE IN CASE may be properly rejected by the court.

COURT IS BOUND TO INTERFERE AND PROTECT WITNESS when the interrogatories put to him upon cross-examination tend to impute crime, or to disgrace him. And an accomplice offered as a witness for the state is entitled to this protection.

TESTIMONY OF WITNESS THAT ACCUSED OFFERED TO PAY HIM FOR ASSISTANCE in defeating criminal prosecutions pending against him is admissible against the defendant, if the language used by him can be fairly inferred to embrace the charge upon which he is being tried, among other cases that he had in mind at the time he uttered it.

TESTIMONY AT PREVIOUS TRIAL OF WITNESS WHO IS LIVING, and within the jurisdiction of the court, is not admissible in a criminal proceeding.

INDICTMENT for entering the house of Charles E. Warren, and stealing therefrom a coat and some children's garments. The evidence of Mrs. Warren, referred to in the opinion, was offered for the purpose of proving the precise day when the offense was committed, one branch of the defense being an *alibi*. The other facts appear from the opinion.

Small, for the respondent.

Bell, solicitor, for the state.

By Court, NESMITH, J. It appears to us that the fact that second-hand coats, like that taken from Warren's house, were sometimes bought and sold at the Exeter depot by workmen on the railroad could have but a remote tendency to explain or answer the positive testimony of the state that the coat in question was actually identified as Warren's, and had been stolen at a particular time from his house, and very soon afterwards was seen on the back of the respondent himself. Such testimony could have but a slight bearing upon the controlling evidence of the case, and we think was properly rejected by the court. The first exception is therefore overruled.

The state offered Mrs. Mary A. Brown, admitted to be an accomplice of the respondent in the crime charged in the indictment. Her evidence is offered and received only under the implied condition of making a full confession of the whole truth. The respondent's counsel, on cross-examination, proposed to ask the witness "if she had not, about the time of the commission of the offense charged in the indictment, committed other larcenies." Also, "if she had not pleaded *no*l.

con. to an indictment for other larcenies." "If she had not charged innocent persons with other larcenies, and confessed this fact."

It will be readily seen that those inquiries extended to collateral matters, and beyond the issue directly before the court. Now, where it reasonably also appears that the answer of the witness will have a tendency to expose her to a penal liability, or to any kind of punishment, or to a criminal charge, the authorities are clear that the witness is not bound to answer. Nor is the witness bound to testify to any particular fact which would be but a single link in the chain of evidence which is to convict the witness. Against such inquiries the law gives the witness the full privilege of protection: *State v. Foster*, 23 N. H. 348 [55 Am. Dec. 191]; *Janvrin v. Scammon*, 9 Id. 280; *Coburn v. Odell*, 10 Id. 540; 1 Greenl. Ev., sec. 451.

But where the obvious intent of the questions was to discredit or disgrace the witness, a question is raised about which much difference of opinion has existed. On the one hand, it has been repeatedly held that a witness cannot be forced to give an answer which will render him infamous, or will involve him in shame and reproach. Wharton, in his Criminal Law, quotes some fifteen decisions in this country and in England in support of the preceding doctrine: *Vide* sec. 809, note.

On the other hand, it has been frequently decided that questions tending to elicit the truth, either as to the main facts of the case or the character of the witness testifying in it, ought to be answered, though they may be calculated to wound the sensibility of an individual: *Rex v. Edwards*, 4 Term Rep. 440; *Roberts v. Allatt*, Moody & M. 192; *People v. Mather*, 4 Wend. 250 [21 Am. Dec. 122], — are the authorities relied on by Wharton in support of the last position.

It has been recently held in New York, in a case well considered, that where a witness is asked a question the answer to which would disgrace him, but could have no bearing on the issue, except so far as it might impeach his credibility, he is privileged from answering it: *Vide Lohman v. People*, 1 N. Y. 379 [49 Am. Dec. 340].

Professor Greenleaf, after much discussion of this subject, thus states his result that the great question, whether a witness may not be bound in some cases to answer an interrogatory to his own moral degradation, where, though it is collateral to the main issue, it is relevant to his character for veracity, has

not yet been brought into direct and solemn judgment, and must be regarded as an open question, and of course resting much upon the discretion of the judge who tries the case: 1 Greenl. Ev., sec. 459. Phillips approves the doctrine that accomplices are not to be questioned in their cross-examination as to other offenses in which they have not been concerned with the prisoner: 2 Phillips on Evidence, 422; Phillips and Abbott on Evidence, 917, 918.

Upon the review of the law on this subject, the question recurs, whether by the decision of the judge who tried this case the respondent was deprived of his just and legal rights, in consequence of the witness being told she need not answer the aforesaid questions put to her by her counsel.

The position of Mrs. Brown as a witness was that of one tainted with admitted crime. And it appears her general character for truth was successfully impeached. She was no doubt thoroughly cross-examined upon the issue before the court by able counsel, who never omit the discharge of duty. We are unable to perceive how the jury who tried the cause could have been deceived or misled by her words or conduct. And we sustain the action of the court who tried the case in the exercise of the discretion used by him in refusing the proposed cross-examination, and we overrule accordingly the exception of the respondent on this point: *Janvrin v. Scammon*, 9 N. H. 280; *Hersom v. Henderson*, 23 Id. 506.

The objection was also taken here that the court cut off the privilege of the witness to answer the questions propounded by a premature decision in her favor. Whether the answer may tend to criminate or expose the witness is a point which the court will at once determine under all the circumstances of the case, and without requiring the witness fully to explain how he may be criminated by the answer which the truth might oblige him to give. For if he were obliged to show how the effect would be produced, the protection which the rule is designed to afford would be nullified.

The doctrine in *Hersom v. Henderson*, 23 N. H. 506, is, that it is the duty of the court to see that witnesses are rightly protected from disgrace, especially where the questions put do not bear directly upon the issue on trial: 1 Greenl. Ev., sec. 460.

The testimony of Brothers would seem to be competent if the language of the respondent to the witness might by fair inference embrace this prosecution or case among the rest of the cases he then had in mind. It was for the jury to de-

termine from the whole conversation employed, especially that about the coat that he got of Mrs. Brown, "who told him to take it and keep it out of the way," whether this was one of the cases he had in his mind, among the rest, about which he solicited the assistance of Brothers, and was willing to pay fifty dollars to secure his aid.

It was settled in the indictment in *Commonwealth v. Sacket*, 22 Pick. 394, that the defendant had the right to ask a witness whether any person in behalf of the government had made to the witness any offer of reward in relation to the testimony he should give in a certain class of cases comprehending the case on trial. If the defendant could legally make so broad and comprehensive inquiry, we think for like reasons may the state. The testimony would evidently be irrelevant, unless this attempt at bribery or subornation of perjury is made to embrace the matter of this indictment among the rest of the cases of larceny to which the offer could be made to apply. In only this view the evidence could be regarded as relevant, and so far only we understand it was actually used. We are therefore of the opinion that this exception should be overruled.

Mrs. Warren, wife of the prosecutor, testified on the former trial in behalf of the state, but being sick at the time of the last trial, the respondent offered to prove what she had testified to on the former trial. The court rejected the evidence, and defendant excepted. We have not known a practice in this state where the witness is alive and within the jurisdiction of the court, and in criminal proceedings, to allow the former statements of the witness to be used. Such testimony is admitted at any time only upon urgent necessity, and in violation of the familiar rule that the best testimony is to be used, and it would be an anomaly in our practice to introduce the produced former statements of a living witness through a copyist or a by-stander. The evidence of a witness in the same cause and at a former trial is not admissible until it has been first proved that he is dead: *King v. Jolliffe*, 4 Term Rep. 290; *Powell v. Waters*, 17 Johns. 176; *Wilbur v. Selden*, 6 Cow. 162; *Le Baron v. Crombie*, 14 Mass. 234; Bull. N. P. 242. In criminal proceedings especially this rule will be strictly enforced. In many jurisdictions the proof of the death of the witness will not justify the use of his former testimony: *People v. Newman*, 5 Hill, 295; *Farrell v. Warren*, 3 Wend. 257; *Finn v. Commonwealth*, 5 Rand. 708; *State v. Atkins*, 1 Over. 229; 2

Haw. P. C., secs. 12, 606; 1 Phillips on Evidence, 199. It seems to be questioned by high authorities if such testimony be admissible at all: *Jackson v. Bailey*, 2 Johns. 17.

Judgment on the verdict.

PROTECTION OF WITNESS FROM DEGRADING QUESTIONS is within the discretion of the court: *Turnpike Road Co. v. Loomis*, 88 Am. Dec. 811, and note 820.

TO RENDER EVIDENCE OF COLLATERAL FACTS COMPETENT, there must be some natural, necessary, or logical connection between them and the inference or result which they are designed to establish: *Commonwealth v. Jeffries*, 83 Am. Dec. 712. Irrelevant and immaterial testimony should be excluded: *Hovey v. Chase*, 83 Id. 514; *Eastman v. Amoskeag Mfg. Co.*, 82 Id. 201; *Boswell v. Goodwin*, 81 Id. 169.

TESTIMONY OF LIVING WITNESS AT PREVIOUS TRIAL OF CRIMINAL CASE, admissibility of. This subject is treated in the note to *Bergen v. People*, 65 Am. Dec. 676, 677.

ADAMS v. BLODGETT.

[47 NEW HAMPSHIRE, 219.]

WHERE GIST OF ACTION IS DISTURBANCE OF PLAINTIFF'S POSSESSION, whatever was done after the breaking and entry is but aggravation of damages.

PLAINTIFF IN TRESPASS MAY ELECT ANY DAY PRIOR TO DATE OF HIS WRIT as the time when the defendant forcibly entered upon his land and converted property thereon to his own use, and the defendant may be compelled to pay the highest market value for the property taken at the place of the conversion, with interest thereon from the time of the taking to the day of the trial.

JURY MAY DETERMINE DAMAGES IN TRESPASS BY MAKING FAIR AVERAGE OF SALES of the same kind of property made near the time and place of the conversion, and both before and after the taking.

ACTS AND DECLARATIONS OF SURVEYOR WHILE SURVEYING ADJOINING LOT are admissible on a question of boundary, where the surveyor is dead, and was not interested as owner in either lot at the time he made such declarations.

INTRODUCTION OF IMMATERIAL TESTIMONY IS NOT GROUND FOR SETTING ASIDE VERDICT.

TRESPASS for breaking and entering the plaintiff's close and carrying away trees and bark. As bearing on the question of damages, the court instructed the jury that the measure of damages was the value of the property at the time of the conversion; that it was their province to find when the conversion was, if there had been one, and that they might consider the evidence as to the price of bark at different times in finding

the value of the same at the time of the conversion. Other facts are stated in the opinion.

Burrows and Pike, for the plaintiff.

Clark and Bingham, for the defendant.

By Court, NESMITH, J. This was trespass *quare clausum fregit*, wherein the defendant is charged with breaking and entering plaintiff's close, situate in Plymouth, in this county, being lot No. 1 in the second range and second division of lots in said town, and with force, etc., cutting and carrying away plaintiff's trees and hemlock bark. The plaintiff's writ is understood to have been dated in March, A. D. 1864. The declaration stated the time of the wrongful entry and injury to plaintiff at some time prior to the date of the writ. The gist of this action is the disturbance or violation of plaintiff's possession. If plaintiff's land be illegally entered, a cause of action at once arises. Whatever is done after the breaking and entry is but aggravation of damages: *Brown v. Manter*, 22 N. H. 468; *Ferrin v. Symonds*, 11 Id. 365.

The defendant offers no justification or license, and the verdict of the jury is found against him. The questions made here have reference to the charge of the judge.

1. As to the damages or price of the hemlock bark taken by defendant. The plaintiff may properly elect any day prior to the date of her writ as the time when the defendant wrongfully and forcibly entered upon her land and carried away and converted to his use the hemlock bark complained of, and the defendant cannot find fault if he be called upon to pay the highest market value of the bark at such time. Such is the elementary rule where the trespass asked is not laid with a *continuando*: 1 Esp. 407; Bull. N. P. 86. And in trespass as well as trover, the plaintiff is not only entitled to recover the market value of the property at the time of the conversion, but also the interest thereon from that time to the time of the rendition of the verdict as a measure of indemnity or as additional damages; and in one case the jury were instructed also to consider, in addition to the value of the timber taken, the deterioration of the land caused by its removal: *Wallace v. Goodall*, 18 N. H. 439.

We think the court, according to the amendment furnished to the case, gave the right rule of damages to the jury. In getting at the true value of the bark, it might be impossible to show sales on the lot where it was peeled, hence it was well to

go to the place of delivery, where a price had been established by sales; or to a neighboring station on the railroad, where similar sales of bark are presumed to have been made. So as to time when this bark was actually hauled off from plaintiff's land, being the true time of its conversion by the defendant, there may not have been any sales of this commodity in that vicinity at or near that time. It occurs to us a fair average price might be arrived at by the jury, by showing evidence of what price of bark was in that vicinity at different times, both before and after the alleged time of conversion. It is well known to be a kind of property which fluctuates in value or price from year to year, and from one part of the same year to another. We do not see how the defendant could be prejudiced by the charge of the court on this point, and think the ruling may be properly sustained.

2. In cases of mere private rights, the declarations of deceased persons who were so situated as to have the means of knowledge, and had no interest to misrepresent, are competent evidence to prove an ancient boundary: *Shepherd v. Thompson*, 4 N. H. 213; *Lawrence v. Haynes*, 5 Id. 37 [20 Am. Dec. 554]; *Great Falls Mfg. Co. v. Worcester*, 15 Id. 412; *Smith v. Powers*, 15 Id. 546; *Melvin v. Marshall*, 22 Id. 381; *Adams v. Stanyan*, 24 Id. 405.

Justice Bell remarks, in giving his opinion in one of the above cases, that the admissibility of this kind of proof is not now an open question. It is admitted as traditionary evidence, or secondary in its character, and as the best the case admits of. "Inscriptions on walls, and fixed tables, mural monuments, grave-stones, surveyors' marks on boundary trees, etc., which, as they cannot be conveniently brought into court, may be proved by secondary evidence": 1 Greenl. Ev., sec. 94. But when they can be brought into court, their actual production is required, according to the English rule of evidence as stated in the cases referred to in note to the aforesaid section: *Vide* also note and additional authorities in 1 Greenl. Ev., sec. 145.

In the opinion of Chief Justice Perley in the case of *Melvin v. Marshall*, *supra*, he states that in *Prescott v. Hawkins*, 22 N. H. 191, a witness for the plaintiff testified that a deceased surveyor of Holderness, who was understood to have made the original survey and division of that town, went to the spot and pointed out a boundary as the corner of a certain lot, and the evidence was held in this court to be competent.

So also in *Van Deusen v. Turner*, 12 Pick. 532, it was held that upon a question of boundary the declaration of a deceased person, who pointed out a line of marked trees, declaring it was a known division line, was admissible in evidence as part of the *res gestæ*. The court in that case say, had the deceased been requested to go and point out the line, and he had done it without any declaration whatever, it would have been an act of the same character, and admissible upon the same principle.

Now, to apply the law to the facts of this case. We find Jonathan Cummings, an experienced land surveyor, making a survey many years ago of lot No. 2 in Plymouth. Finding the northeast corner of said lot, he runs the line dividing it from No. 1 in the same range to the northwest corner of lot No. 2, and the southwest corner of lot No. 1. After some delay, he also finds there a spruce-tree, fallen and partly decayed, and with marks apparently made with a marking-iron, on two pieces thereof; the one mark representing I, the other II. These marks were examined by the surveyor and the witness who was then with him. Cummings then pronounced this spruce-tree to have been the corner of lots 1 and 2. Cummings is now dead; was not interested as owner in either lot. Had surveyed many of the lots in that part of the town; uncertain whether he had before surveyed either of these lots where the line was in dispute. Under the facts as here disclosed, it is not necessary that the testimony of the witness should be regarded as conveying the opinion of an expert, but rather as the statement or assertion of a distinct fact within the knowledge of the surveyor. When the object of the surveyor's search was found, with its significant marks upon it, he proclaimed that the spruce-tree was the corner of lots 1 and 2. The witness may not only now state what was then found, but also what was then said. The act and declaration are inseparable, and explain or elucidate each other: *Sessions v. Little*, 9 N. H. 271. We think the witness was properly allowed to state both the acts and the declaration of the deceased surveyor, and that our construction of the facts of the case harmonizes with the case of *Wallace v. Goodall*, 18 Id. 439, before quoted on this point. We need not go so far as the court in Massachusetts do in the case of *Davis v. Mason*, 4 Pick. 156.

3. It does not appear from the case that Penniman's testimony did in any material respect apply to or affect the issue before the court.

A verdict will not be set aside on account of the introduction

of immaterial testimony: *Clement v. Brooks*, 13 N. H. 92. There must therefore be judgment on the verdict.

MEASURE OF DAMAGES IN TRESPASS DE BONIS ASPORTATIS IS VALUE OF GOODS, with interest from the time of the taking: *Freidenheit v. Edmundson*, 88 Am. Dec. 141.

ADMISSIBILITY OF DECLARATIONS OF DECEASED PERSONS AS TO BOUNDARIES: *Wood v. Willard*, 86 Am. Dec. 716, and note 721; *Wood v. Foster*, 85 Id. 681, and note 682; *Wood v. Willard*, 84 Id. 659, and note 664.

ADMISSION OF IRRELEVANT TESTIMONY AFTER OBJECTION THERETO will not be sufficient ground for setting aside a verdict, unless it appears, or may reasonably be intended, that the evidence has prejudiced the complaining party: *Lynd v. Picket*, 82 Am. Dec. 79, and note 91; and see *Gasson v. Madigan*, 82 Id. 659.

ACTS OF TRESPASS PRIOR TO EARLIEST DAY LAID IN COMPLAINT may be proved under the New York statute, though trespasses laid under a *continendo* have already been proved: *Dubois v. Beaver*, 82 Am. Dec. 326.

WENTWORTH AND WIFE v. REMICK.

[47 NEW HAMPSHIRE, 226.]

HUSBAND AND WIFE SHOULD JOIN IN WRIT OF ENTRY to recover possession of land which was conveyed to them both during their natural lives.

WRIT of entry to recover possession of a tract of land. The opinion states the case.

Burns and Fletcher, for the plaintiffs.

Ray, Benton, and Heywood, for the defendant.

By Court, SARGENT, J. As a general rule, joint tenants, having a unity of title and of interest as well as of possession, must join in a suit relating to their joint property; while tenants in common, having only a unity of possession, but with distinct titles and interests, must sever: 1 Ch. Pl. 12, 13; 1 Bla. Com. 180, 191; 4 Kent's Com. 357 et seq.; *Campbell v. Wallace*, 12 N. H. 370 [37 Am. Dec. 219]; *Hills v. Doe*, 6 Id. 328; *Rand v. Dodge*, 12 Id. 68.

A conveyance to husband and wife in fee does not create a joint tenancy technically speaking, but the estate is much more like a joint tenancy than a tenancy in common. All the unities that exist in a joint tenancy exist in this estate, only they are more indissoluble here than in that estate; a joint tenancy may be terminated by partition which severs the unity of possession, or by alienation which severs the unity of

title, or by any act that severs either of the unities of time or interest. But in a deed to husband and wife, they take each, not *per my et per tout*, as in joint tenancy, but *per tout* only. They being in law but one person cannot take by moieties, but are both seised of the entirety, so that during their joint lives neither of them can alien so as to bind the other, nor does the attainder of the husband affect the right of the wife, nor is their estate affected at all by the statutes of partition.

The right of survivorship, the *jus accrescendi*, belongs to the estate vested in husband and wife the same as in joint tenancies, but with the difference, already noticed, that this right in the former case is not liable to be defeated in any of the ways in which it may be defeated in joint tenancies by a severing of any of the unities. So that if there is any good reason why joint tenants should join in a suit where tenants in common should not, the same reasons would exist in still stronger force why the husband and wife should join in a similar suit. Nor do the statutes of the several states abolishing or restricting joint tenancies apply to or affect this joint estate of husband and wife: 4 Kent's Com. 362; 1 Bla. Com. 182; Co. Lit. 187; *Brownson v. Hull*, 16 Vt. 312 [42 Am. Dec. 517]; *Titus v. Ash*, 24 N. H. 328; *Shaw v. Hearsay*, 5 Mass. 520; *Wright v. Sadler*, 20 N. Y. 320.

Since, then, this is not only a joint estate during the life of both, but the wife, if she survived the husband, has the whole estate for her life, and this right of survivorship in the wife, as well as her present interest, cannot be defeated in any of the ordinary modes of defeating joint tenancies, the right of action would of course survive to the wife after the decease of the husband; and the general rule is, that in all cases where the cause of action by law survives to the wife, the husband and wife must join, and he cannot sue alone: *Clapp v. Stoughton*, 10 Pick. 469; *Saunders on Pleading and Evidence*, 567; *Dunstan v. Barwell*, 1 Wils. 224; *Schoonmaker v. Elmendorf*, 10 Johns. 49; *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 573.

Under the deed in this case, these plaintiffs had a joint estate of freehold during their joint lives and the life of the survivor, with remainder to the oldest male heir of the two, if living at the time of their decease, otherwise to John Wentworth's heirs generally. The wife had a joint interest with her husband, and was jointly seised with him of the premises in question, with the right of survivorship in the wife for her life if she

outlived her husband, and was properly joined with him in the suit.

Judgment on the verdict.

LANDS GRANTED OR CONVEYED TO HUSBAND AND WIFE are held by them as tenants by entireties: *Bennett v. Child*, 88 Am. Dec. 692; *Ketchum v. Walesworth*, 68 Id. 49, and note 55.

WELLS v. JACKSON IRON MANUFACTURING Co.

[47 NEW HAMPSHIRE, 285.]

CAPTION OF DEPOSITION MUST STATE WHETHER OR NOT ADVERSE PARTY OBJECTED, even though he did not attend; and it is not sufficient to state that he attended on a subsequent day to which the caption was adjourned, and one deposition taken and did not object.

STATEMENT THAT ALL DEPONENTS BUT ONE APPEARED ON CERTAIN DAY, and that he appeared on the following day, and that each separately and severally made oath, etc., shows that each took the proper oath.

QUESTIONS ASKING WITNESS WHETHER OR NOT HE IS ACQUAINTED WITH SIGNATURES to certain deeds, and whether or not they are genuine, are not leading.

FACT THAT PARTY SETS UP CLAIM UNDER CONVEYANCE FROM CERTAIN PERSON does not prevent him from also setting up tax title, if he has acquired such, nor from relying upon mere possession.

QUITCLAIM DEED FROM GRANTEE OF TAX COLLECTOR WILL BE COLOR OF TITLE, and an entry under it will give the grantee possession of the whole tract described in it.

EXECUTION OF DEEDS NEED NOT BE PROVED where they are offered as part of a chain of title, and it appears from official certificates upon them that they have been regularly recorded.

PRACTICAL LOCATION IS BUT ACTUAL DESIGNATION BY PARTIES upon the ground of the monuments and bounds called for by the deed.

SURVEY OF LAND AND ERECTION OF MONUMENTS WITH VIEW OF SUBSEQUENT CONVEYANCE cannot be admitted in evidence to vary or control the deed afterwards made, where the deed calls for none of the monuments, and does not refer to the survey.

IN CONSTRUING DEED, ALL PRIOR NEGOTIATIONS MUST BE TAKEN AS MERGED in that instrument, the conclusive presumption being that the whole engagement of the parties, and the extent and manner of it, were reduced to writing.

ENTRY ON LAND BY PLAINTIFF'S GRANTOR GIVES HIM SUCH SEISIN as to enable him to maintain a writ of entry against a defendant who shows no evidence of title.

IT IS SUFFICIENT TO SHOW PERSON TAKING DEPOSITION TO HAVE BEEN ACTING COMMISSIONER or notary public.

QUESTION ASKING WITNESS TO STATE WHAT HE KNOWS IN REFERENCE TO EXECUTION OF INCLOSED PAPER is not leading.

TRACT OF LAND, THOUGH UNINHABITED, MAY BE PROPERLY TAXED.

ADVERTISEMENT OF SALE OF LAND FOR TAXES NEED NOT BE POSTED in unincorporated place which is not inhabited.

WHERE ORIGINAL PAPERS TOUCHING SALE OF LANDS FOR TAXES FILED IN CLERK'S OFFICE ARE DESTROYED BY FIRE, their contents may be proved by secondary evidence where the case does not disclose any better evidence. And it is not necessary in such a case that the record should be made up anew under the direction of the court. Such records are not proper records of the court itself, but are merely deposited in the office of the clerk.

WHERE SINGLE SUM IS ASSESSED UPON UNINCORPORATED PLACE, the treasurer's warrant is a list within the meaning of the statute, and the certificate of the deputy secretary upon the copy of it returned by the collector is competent evidence of the time of filing and return.

CLERK AT AUCTION SALE FOR TAXES IS NOT OFFICER making or controlling the sale, and may become a purchaser thereof.

IF PORTION OF TRACT KNOWN AS "SARGENT'S PURCHASE" HAD BEEN ANNEXED by the legislature to the town of Jackson, what remained would constitute "Sargent's Purchase," and be liable for the proportion of taxes assigned to that location.

ALLOTMENT BY PLAN MAY INDICATE WITH CERTAINTY LOCATION OF EACH AND EVERY LOT, although no lot lines may in fact have been run out; if the lots can be made certain, that will be sufficient.

COURT WILL TAKE JUDICIAL NOTICE THAT CERTAIN PERSON WAS GOVERNOR of the state at a certain date, and of the genuineness of his signature.

IN NEW HAMPSHIRE, COURSES IN DEED ARE PRESUMED TO HAVE BEEN RUN ACCORDING TO MAGNETIC MERIDIAN, unless there is something in the instrument to indicate a different method. And the word "due" prefixed to the courses will not justify the inference that a different method is intended.

EVIDENCE OF ACTUAL INTENTION OF PARTIES OR OF SURVEYOR is not admissible to affect the construction of a deed.

WRIT of entry for a tract of land, being part of a tract known as Thompson and Meserve's Purchase, bounded as follows: "Beginning at the northwest corner of Pinkham's Grant, so called, in said county; thence north eight degrees west to the southerly line of Low and Burbank's Grant, so called; thence southwesterly on the line of said Low and Burbank's Grant to the northeast corner of the tract known as Jeremiah Chandler's Purchase; thence south one and a half degrees west on the easterly line of said Chandler's Purchase eight hundred rods; thence south eighty-eight and a half degrees east to the west line of said Pinkham's Grant; thence northerly on the westerly line of said Pinkham's Grant to the place of beginning." Also another tract in said county of Coos, known as the Thompson and Meserve's Purchase, containing twelve thousand acres. Plea, the general issue as to the parcel of the demanded premises known as Sargent's Purchase, and a disclaimer as to the rest. The chief matter in controversy was the title to the summit of Mt. Washington, which the

plaintiffs claimed as owners of Thompson and Meserve's Purchase, and the defendant as owner of Sargent's Purchase. After the trial had proceeded several days, the case was by consent withdrawn from the jury for the purpose of determining the questions of law raised by the rulings of the court. When these questions were determined, the case was to be discharged. The plaintiffs introduced as evidence of paper title:

1. A resolution of the senate and house authorizing the governor to appoint a land commissioner, whose duty it was made to sell certain lands of the state and execute deeds therefor, to be recorded in the office of the secretary of state.
2. A copy of the proceedings of the governor and council nominating and appointing James Willey land commissioner.
3. Willey's commission and oath of office.
4. Copy of quitclaim deed from Willey to Thompson and Meserve, conveying a tract of land "beginning at the northwest corner of Pinkham's Grant, thence running westerly by the south line of Shelburne Addition and the south line of Low and Burbank's Grant to the northeast corner of Jeremiah Chandler's Grant; thence due south on the east side line of said Chandler's Grant so far that a due east line extending to the west line of said Pinkham's Grant shall contain twelve thousand acres; thence northerly on said west line to the first bound." This copy was admitted over defendant's objection upon plaintiffs' undertaking to show a chain of title.
5. A quitclaim deed, Thompson to John Bellows, of same premises as described in Willey deed.
6. A quitclaim deed, Meserve to John R. Hitchcock, of same premises.
7. A quitclaim deed, J. R. Hitchcock to John Bellows, of same premises.
8. A quitclaim deed, John Bellows to the plaintiff, of the same premises.

The plaintiff then introduced the following further items of paper title:

1. Copy of quitclaim deed, Thompson and Meserve to Daniel Eastman; description: "Beginning at the southwest corner of Daniel Elkins's land formerly owned by Joseph Hanson, thence running due west one mile; thence northerly parallel to Pinkham's Grant about three miles to Low and Burbank's Grant; thence westerly by said Low and Burbank's Grant to the northeast corner of Jeremiah Chandler's Grant; thence due south on said Chandler's Grant so far as that a due east line extending to said Pinkham's Grant shall contain ten thousand acres; thence due east to said grant; thence northerly on said grant to the first bound, it being a part of a tract of land which we purchased of James Willey."
2. Copy of war-

ranty deed, Daniel Eastman to George A. Whitney and John Wetherell,— same premises last described. 3. A quitclaim deed, George A. Whitney, John G. Wetherell, Charles Faulkner, and Anne S. Faulkner to plaintiff, conveying their interest derived under the last-named deed, and under a deed from Joseph C. Cady to said Wetherell and Whitney. To prove the signatures and witnesses of said deed, and other matters, plaintiff introduced the depositions of Charles Faulkner, J. E. Parker, F. F. Saxton, M. D. Kimball, G. E. Whitney, T. E. Whitney, F. P. Dunlop, T. N. Fogue, and C. G. Wood. The depositions were taken by a commissioner in Boston, and were annexed to one caption, which certified that all the deponents personally appeared before the commissioner on a certain day, except G. E. Whitney, who appeared on the next day, "and each separately and severally made solemn oath that the within deposition by him subscribed contains the truth." It also stated that the defendant was duly notified, but was not present at the taking on the first day, but was present at the taking on the next day by its attorney, A. B. Merrill, and did not object. The second and fourth interrogatories to G. A. Whitney, referred to in the opinion, were as follows: "2. Are you or are you not acquainted with the signatures of any of the grantors or witnesses to the deed here produced? 4. State whether in your opinion the signatures of George A. Whitney, of T. E. Whitney, and Fanny Davis upon the deed here produced and hereunto annexed are or are not genuine." The plaintiff then introduced two items of a tax title: 1. Deed, Charles Bellows, sheriff and collector, to Joseph C. Cady. 2. A quitclaim deed, Joseph C. Cady to John Bellows. Thompson then testified, as a witness for the plaintiff, in reference to the survey made by him and Willey, which is referred to in the opinion. The testimony of this witness, among other things, tended to show that these proceedings of Willey and Thompson were after negotiations between them for the sale, and a few days before the date of the Willey deed, and that their object was to fix the bounds of the land to be conveyed. Plaintiff then introduced the witnesses Spalding and Davis, who testified as stated in the opinion. Defendant then moved for a nonsuit, which motion the court overruled. The defendant then introduced the following items of paper title: 1. A copy of a quitclaim deed, James Willey, land commissioner, to Jacob Sargent, conveying the tract of land described as "beginning on the northeast corner of a lot of land

given to widow Dorcas Eastman of said Bartlett by the legislature of New Hampshire; thence running due west three and a quarter miles; thence due north so far as that a due east course extending to the west line of the town of Jackson or Pinkham's Grant shall contain twenty-five thousand acres; thence southerly on said westerly line of Jackson to the south-westerly corner thereof; thence south so far as that a due west course shall strike the first-mentioned bounds, — excepting 150 acres which I have sold Otis Eastman." 2. Deed, G. P. Meserve, sheriff and collector, to Jared W. Williams, description, "the whole of the unincorporated and unorganized place called Sargent's Purchase," excepting certain enumerated lots. 3. A quitclaim deed, J. W. Williams to George M. Herring, — description same as last. 4. A quitclaim deed, George M. Herring to G. P. Meserve, description same as last, "and the west half of said lot No. 6 in the third range of lots in addition." 5. A quitclaim deed, G. P. Meserve to Samuel D. Coues, and David Pingree, description same as in last deed. 6. A quitclaim deed from Samuel E. Coues and David Pingree to the defendant, — description same as in last deed. To prove the execution of the last deed, defendant introduced the depositions of Charles De Selding, James O'Donnell, and G. W. Green, and the testimony of E. S. Coe. There was no evidence of the genuineness of the signature of Sarah De Witt, one of the witnesses to the signature of Coues. The second interrogatory in De Selding's deposition, referred to in the opinion, is as follows: "Please state what you know in reference to the execution of the inclosed paper, which purports to be a deed from Samuel E. Coues and David Pingree to Jackson Iron Manufacturing Company, and which is dated November 18, 1853." The defendant then introduced evidence to sustain its tax title, and afterwards introduced several witnesses. The facts necessary to an understanding of the remainder of the decision are stated in the opinion.

Binghams, Benton, and Ray, for the plaintiff.

Burns and Fletcher, and Heywood, for the defendant.

By Court, *BARTLETT, J.* The copy of the deed from Willey was properly received as part of the plaintiff's chain of title: *Harvey v. Mitchell*, 31 N. H. 582. The first objection to the caption of the depositions of Charles Faulkner and others is well taken, as it does not state whether on the 12th of April the defendant did or did not object: *Rand v. Dodge*, 17 Id.

355; but we think the other two objections are unfounded, as the caption explicitly states that the defendant was present on the 13th, and did not object, and it shows with sufficient certainty that each of the deponents took the proper oath.

The objection that the deposition of George A. Whitney was not properly taken on interrogatories seems without foundation in fact; and the exceptions to the second and fourth interrogatories must be overruled, for neither of them, upon any fair construction, is leading, and certainly it was competent for the plaintiff to prove the genuineness of the signatures, and the answer to the third interrogatory shows the witness qualified to give his opinion.

We are unable to appreciate the force of the objection that "the deeds from Charles Bellows to Cady, and from Cady to John Bellows, are a source of title different from what had been before introduced"; for we see nothing in the fact that the plaintiff has set up a claim under conveyances from Thompson and Meserve to prevent him from showing a tax title also, if he has acquired such, or from relying on mere possession. The deed of Cady to Bellows is said to have been a quitclaim, but that furnishes no legal ground of objection to its admissibility, and it would be color of title even if the deed from Charles Bellows conveyed no interest to Cady: *Minot v. Brooks*, 16 N. H. 374; *Rand v. Dodge*, 17 Id. 343; and an entry by a grantee under such a deed would give him possession of the whole tract described in it: *Tappan v. Tappan*, 31 Id. 53; *Gage v. Gage*, 30 Id. 425. As these deeds were offered as part of a chain of title, and appeared by official certificates upon them to have been regularly recorded, it was unnecessary to prove their execution: *Bellows v. Copp*, 20 Id. 502; *Knox v. Silloway*, 10 Me. 202; 1 Greenl. Ev., sec. 571, note.

A practical location is but an actual designation by the parties upon the ground of the monuments and bounds called for by the deed: *Sanborn v. Clough*, 40 N. H. 316; *Colby v. Collins*, 41 Id. 304; *Peaslee v. Gee*, 19 Id. 274; 4 Cowen and Hill's Notes to Phil. Ev. 549; *Jenks v. Morgan*, 6 Gray, 448; *Cleveland v. Flagg*, 4 Cush. 76; *Kellogg v. Smith*, 7 Id. 382; *Knapp v. Marlborough*, 29 Vt. 282. The testimony of Thompson did not tend to show a practical location of the land conveyed by Willey's deed. The transaction he states was not a designation of the monuments, etc., called for by that deed, for the deed was not then in existence: *Sanborn v. Clough*, *supra*;

Peaslee v. Gee, *supra*; and the prior negotiations must be taken, so far as the construction of the deed is concerned, to have been merged in that instrument, "the conclusive presumption being that the whole engagement of the parties, and the extent and manner of it, were reduced to writing": *Nutting v. Herbert*, 35 N. H. 121; *Cook v. Combs*, 39 Id. 597 [75 Am. Dec. 241]; *Galpin v. Atwater*, 29 Conn. 97; *Parkhurst v. Van Cortland*, 1 Johns. Ch. 282; *Clark v. Wethey*, 19 Wend. 323; 4 Cowen and Hill's Notes to Phil. Ev. 519. The deed contained no reference to any monument established by Thompson and Willey, or to any survey by them: *Sanborn v. Clough*, 40 N. H. 239; and the effect of the evidence at most could be merely to show that Willey and Thompson intended a different tract of land from that afterwards conveyed by the deed, if the lines of their exploration are found to differ from the calls of the deed; and its reception to control the deed would be in violation of a principle quite elementary: *Bell v. Morse*, 6 Id. 208; *Furbush v. Goodwin*, 25 Id. 426; *Dean v. Erskine*, 18 Id. 83; *Clough v. Bowman*, 15 Id. 514; *Cook v. Babcock*, 7 Cush. 526; *Curtis v. Francis*, 9 Id. 421; *Knapp v. Marlborough*, 29 Vt. 282; *Linscott v. Fernald*, 5 Me. 496; *Flagg v. Thurston*, 13 Pick. 150; *Allen v. Kingsbury*, 16 Id. 235; *Dawes v. Prentice*, 16 Id. 435; *Pride v. Lunt*, 19 Me. 115.

Besides, Meserve, who was one of the grantees in the deed, was not a party to this transaction by Willey and Thompson, and there is no evidence that he ever authorized or ratified it: *Prescott v. Hawkins*, 12 N. H. 27. This evidence was therefore incompetent to affect the construction of the deed; and it does not tend to show that the summit of Mt. Washington is within the tract conveyed by it, as there is nothing in the testimony of Thompson tending to show that the westerly line over which they pass was on the easterly line of Chandler's Grant; and although the subsequent entry by Thompson under the deed gave possession of all the tract conveyed by it, yet there is no evidence that Mt. Washington is part of that tract.

But the motion for a nonsuit was properly denied, for the case finds that the evidence of Spalding and Davis tended "to show John Bellows's possession of Mt. Washington at various times between 1851 and 1859"; and this is evidence of his seisin as against the defendant, for at the time of the motion no evidence of title in the defendant appeared: *Rand v. Dodge*, 17 N. H. 343; *Wendell v. Blanchard*, 2 Id. 456; *Woods v. Banks*, 14 Id. 113; *Jones v. Merrimack Co.*, 31 Id. 384; *Parker v. Brown*,

15 N. H. 185; *Lund v. Parker*, 3 Id. 50; *Graves v. Amoskeag Co.*, 44 Id. 464; *Straw v. Jones*, 9 Id. 402; *Sparhawk v. Bullard*, 1 Met. 95; and the deed from John Bellows to the plaintiff would give the latter such seisin as would enable him to maintain this action against one who showed no evidence of title: *Edmunds v. Griffin*, 41 N. H. 532; *Tappan v. Tappan*, 36 Id. 120; *Carter v. Beals*, 44 Id. 413; *Ward v. Fuller*, 15 Pick. 185.

If it was necessary under the statute to prove the handwriting of both of the subscribing witnesses to the signature of Coues in order to show that his title passed (see *Cram v. Ingalls*, 18 N. H. 616; *Melcher v. Flanders*, 40 Id. 156), still no objection is suggested to the proof of the execution by Pingree, and the deed was admissible to show the conveyance of his interest to the defendant.

Parol proof of the appointment and commission of Selden would seem incompetent, but it was quite sufficient to show him an acting commissioner or notary: *Bellows v. Copp*, 20 N. H. 503; *Prescott v. Hayes*, 42 Id. 56; *Forsaith v. Clark*, 21 Id. 422. The second interrogatory in Selden's deposition is not leading, and the objection that no deed was inclosed seems not sustained in fact. Had objection been taken to the regularity of that mode of taking depositions, it is unnecessary now to say whether it ought to have been sustained. Obviously, the practice of founding an interrogatory or answer in a deposition upon a deed merely "inclosed" is very loose, and not to be encouraged, as, aside from its inconvenience, it might open a wide door for fraud and mistake: See *Brown v. Clark*, 41 Id. 245; but no question upon this point has been reserved.

There is nothing tending to show that the deed was fraudulently or intentionally withheld when the depositions were filed; and as an examination of the depositions would have given the plaintiff notice as to the deed, so that he might have procured an order for placing it on file if it ought to have been filed, and need not have suffered by the omission, we see nothing in the mere circumstance of the neglect to file the deed that should exclude the deposition. Besides, the depositions seem to have been filed under the twenty-sixth rule of court for the purpose of limiting the adverse party in the time and manner of objecting to the caption; and in such case, the only effect of a failure by the defendant fully to comply with that rule would seem to have been a failure to obtain the restriction of the plaintiff under the rule.

Numerous questions have been raised in reference to the evidence of a tax title introduced by the defendants, but several of them have not been argued by counsel, and may possibly not arise or may be obviated upon a trial of the cause; and upon the merits of some of these we have not deemed it advisable to pass at this time.

Sargent's Purchase, though uninhabited, might properly be taxed: *Wells v. Burbank*, 17 N. H. 393; *Russell v. Dyer*, 40 Id. 173; Laws 1831, p. 26; Laws 1805, p. 448; and was made liable to a tax by the legislature: Laws November, 1840, p. 173. In *Wells v. Burbank*, 17 N. H. 394, it was decided that "it is not necessary to post an advertisement of a sale for taxes in an unincorporated place which is uninhabited"; and we do not understand the authority of this case upon that point to have been shaken by any subsequent decision: *Russell v. Dyer*, 42 Id. 399. We do not now see any sufficient reason for overruling the case in that particular. It cannot, as in *Russell v. Dyer*, 40 Id. 184, be presumed that the legislature did not intend to subject such an uninhabited place to the statutes relative to taxation, since this and other similar places have for many years been specially named in our statutes as objects of taxation, and the taxation without the power of collection by sale would seem futile; so that upon a careful comparison of the objects and provisions of the statutes in question here with those considered in *Russell v. Dyer*, *supra*, as well as in reasons of public policy, we find sufficient grounds for a distinction between the latter case and *Wells v. Burbank*, *supra*. Under these circumstances, as the doctrine of *Wells v. Burbank*, *supra*, does not seem likely to work any real practical injustice, and as it is probable that a very considerable number of titles to real estate acquired during the twenty years since the decision in that case was made, and while it has been unquestioned by the court and undisturbed by legislation, may depend upon the rule there laid down, we should deem it our duty under the law not now to question its correctness unless for more cogent reasons than appear to exist in cases under the acts in question: Broom's Legal Maxims, secs. 109 et seq.; Fearne on Contingent Remainders, sec. 134; and we must therefore regard the authority of that case as decisive here. If, therefore, Sargent's Purchase was uninhabited, it was unnecessary to post any advertisement of the sale within its limits, and it would be immaterial where upon the Purchase, or when the notices were put up or taken down, or whether they were ever returned to

the clerk's office. The original warrant was returned to the state treasurer, and as nothing further appeared, its contents could not properly be proved by parol. If the loss of the record in the clerk's office was shown, its contents could be proved by parol certainly so far "as the case does not from its nature disclose the existence of other and better evidence": 1 Greenl. Ev., sec. 509; *Scammon v. Scammon*, 83 N. H. 59; *Forsaith v. Clark*, 21 Id. 418.

As the sale was in January, 1843, and the Revised Statutes did not take effect till the following March (R. S., p. 474, sec. 1), we are to look to the statutes in force prior to the Revised Statutes for the provisions to govern the proceedings. By the statute then in force, the sheriff was required to deposit with the clerk the lists and other papers containing evidence of his proceedings in the sale of lands for taxes; and it was made the duty of the clerk to receive and preserve them, and to make and certify copies thereof, as of other papers on file in the office: Act of December 16, 1824, Laws 1830, p. 572. As the statute requiring the deputy secretary of the state to retain in his office a certified copy of the list returned to the collector was not in force at the time of these transactions (Laws 1847, c. 495), we need not inquire whether, in case of the loss of the original, resort should be had to that before introducing parol evidence: See 1 Greenl. Ev., sec. 84, and note; 4 Cowen and Hill's Notes to Phil. Ev. 285; *Melvin v. Marshall*, 22 N. H. 382.

As already stated, upon proof of the loss of the originals in the office of the clerk, their contents may be proved by any secondary evidence, where the case, from its nature, does not disclose the existence of other and better evidence; and we do not find that any exception in the case of records like these is made by the common law or by our statutes; and therefore the plaintiff's objection that "the record should have been made up anew under the direction of the court," etc., and that the record so made up would be the only competent evidence, cannot be sustained. He does not cite any authority for his position, or point out any law or show any usage requiring such a renewal of the record; and it is to be observed that the records so deposited in the clerk's office are not proper records of the court itself, for they are not made by its officers as such, and do not contain its transactions; they are merely deposited in the office of the clerk; so that we see nothing in the nature of the case that should require

what neither the common law nor our statutes have prescribed, nor any well-settled usage established.

Where a single sum is assessed upon an unincorporated place, the treasurer's warrant is a list within the meaning of the statute: *Wells v. Burbank*, 17 N. H. 407; *Homer v. Cilley*, 14 Id. 100; and if a copy of it was duly returned by the collector, this was a sufficient compliance with the second section of the act of July 4, 1829: Laws 1830, p. 564; and the certificate of the deputy secretary upon it was competent evidence of the time of filing and return: *Wells v. Burbank*, 17 N. H. 409; *Smith v. Messer*, 17 Id. 430; and this having been destroyed, its proof would fall within the rule already stated.

The evidence tends to show that the sheriff, within ten days after the sale, delivered to the clerk a copy of his sale, but there is no evidence that it was accompanied by his charges, according to the provision of section 4 of the act of 1829, Laws 1830, p. 565; that section, however, does not provide that the account of the sale shall be under oath, nor have we found any such requirement prior to the Revised Statutes: R. S., c. 4609; but under the act of 1829 the copy of the sale was to be attested.

As Meserve testified that on the day after the sale he filed with the clerk a copy of the record of sale, "with the Patriot and Democrat and all other papers," the jury might have found that within ten days after the sale he so filed the copy of his list, if that were essential; but it may not be altogether clear that this is required by the statute. Section 4 of the act of 1829 only provides for the filing of "an attested copy of the sale," with charges of sale, within ten days after the sale; and section 7 makes it the duty of the collector to lodge with the town clerk, within ten days after the sale, the newspapers containing the advertisement of such sale, and the advertisement which may have been posted up in such town, with a certificate accompanying the same, under oath, that it was posted up according to law, which advertisement and certificate shall be recorded by the town clerk, and a certified copy of such record shall be deemed sufficient evidence of those facts in any court of law; and the said newspapers shall be kept on file by the clerk. The act of July 1, 1831, Laws, p. 26, gave the sheriff in a case like this "the same power and authority with respect to the taxes committed to him to collect, which collectors of towns have or may from time to time by law have with respect to the taxes of non-residents"; and provides that "he

shall observe the same directions as collectors of towns are or may from time to time be bound by law to observe in collecting the taxes of non-residents," etc.; with a proviso requiring an advertisement in the shire town of the county as well as in the place where the lands lie. The first section of the statute of December 16, 1824, enacted "that the lists returned by the receiver of non-resident taxes, and other papers containing evidence of the proceedings of any former or future sheriff of any county in this state relating to sales of land by him as sheriff for state and county taxes, be deposited in the office of the clerk of the superior court," etc.; and that it "be the duty of the said clerk to receive and preserve the same, and to make and certify copies thereof as of other papers on file in said office"; and the second section provided that such copies might be used as evidence in courts of law in all cases in which the originals might be used," and with the "same force and effect": Laws 1830, p. 572. And in *Wells v. Burbank*, 17 N. H. 410, it is decided that the act of July, 1831, did not repeal this act of 1824. The eighth section of the act of 1829 relates merely to lands redeemed. These would seem to be all the provisions of the statute upon the subject then in force. The act of 1831 only provides what the sheriff shall file, and when he shall file it, by reference to other laws. The act of 1824 seems to be the only statute at that time requiring the list to be filed with the clerk of the court, and it contains no express provision as to the time; while the act of 1829, which is the only statute fixing the time for filing the papers by the collector, does not appear to include the list; and as the land might be redeemed within one year from the sale by a tender to the collector (Laws 1830, p. 565, sec. 4), it may admit of a doubt whether the copy of the list was required to be filed with the clerk within ten days after the sale; but it is unnecessary now to decide this question.

Besides, it is not entirely certain that the neglect of the sheriff after the sale seasonably to file a copy of his sale, or his list, or the list of lands redeemed, should defeat the title of a *bona fide* purchaser acquired under a previous sale legally made to him, where such purchaser has himself been in no fault: See *Smith v. Messer*, 17 N. H. 428; *Smith v. Bradley*, 20 Id. 120; *Scammon v. Scammon*, 28 Id. 432; *Pierce v. Richardson*, 37 Id. 310, 312; *Hayes v. Hanson*, 12 Id. 290; *Cardigan v. Page*, 6 Id. 193; *Tucker v. Aiken*, 7 Id. 113; *Pinkham v. Murray*, 40 Me. 587; *Lane v. James*, 25 Vt. 481; *Taylor v. French*,

19 Id. 49; *Sumner v. Sherman*, 13 Id. 609; but we do not propose to pass upon this question at the present time.

The clerk at the auction was not an officer making or in any way controlling the sale, and we see no legal objection to his becoming the purchaser.

It is said that a part of Sargent's Purchase was annexed to Jackson in 1837. If chapter 336 of the laws of that year is referred to in this statement, that fact does not appear on the face of the act, which merely establishes the location of certain lines of the town. If, however, the effect of that statute was as stated, then the part so annexed would thereafter, for purposes of taxation, cease to be part of Sargent's Purchase, and become part of Jackson, and liable to taxation as part of that town; and the residue of the original Purchase would for such purposes remain Sargent's Purchase, precisely as in the case of any town in the state after a farm has been severed from it and annexed to an adjoining town; and the apportionment of December 22, 1840, Laws, p. 499, which fixes the proportion of Sargent's Purchase at two cents for each thousand dollars to be raised by the state, must be taken to mean Sargent's Purchase as it existed for purposes of taxation, in the same way as it denoted the towns and other places as they legally existed or might exist for such purposes. Whether in the absence of any statutory provisions the objection that the deed included less than was sold could avail between these parties, we have not inquired; for by the sixth section of the act of 1829 it is provided that when two or more persons are interested in any tract of land so sold, every individual may redeem his own part thereof by paying or tendering his proportion of the taxes and costs for which the said land was so sold, and this proportion shall be according to the number of acres in the tract of land sold. Section 14 provides that when any estate of non-residents shall be sold by virtue of this act, and the money necessary for the redemption thereof shall not have been paid or tendered within one year from the sale thereof, the collector shall then execute a good and sufficient deed of such estate to the purchasers of the same, etc.; and it prescribes the form of the deed, with covenants that the collector has conformed to the requirements of the law in making the sale, and that as collector he has "good right, so far as that right may depend on the regularity of his own proceedings, to sell and convey the same in manner aforesaid": Laws 1830, p. 567. The collector, then, is to execute a deed of

what has been sold and not seasonably redeemed; and if he excepted from the conveyance those lots redeemed within the year, he seems to have followed the statute, for although they had been sold, yet as they had been seasonably redeemed, they did not come within the description of the fourteenth section, while the residue of the land sold did. If any one of those interested in the tract had paid his proportion before the sale, his share was properly omitted in the sale: Laws 1830, p. 565, sec. 3. The objection that they sold the whole of the original Sargent's Purchase, including the parts on which the taxes had been paid, and the part annexed to Jackson, if there were such, does not seem very clearly supported by the case, for such a fact is by no means necessarily to be inferred from the evidence stated, which is at least quite as susceptible of a different interpretation.

Whether upon Meserve's testimony that he sold "the whole tract except what had been paid on," naming and excepting the lots upon which payments had been made, and stating "the tract and the amount of taxes and costs," in connection with his deed after proof of the loss of the records, the jury could have found that the taxes had been paid for the lots excepted from the sale, and that the residue had been sold for the remainder of the taxes and costs; or whether it was necessary to show these facts more specifically, so that the amount paid for each portion, the number of acres in each of such portions, and in the residue or the relative interests of the owners in the tract, and the amount for which as taxes and costs such residue was offered and sold, should appear, and whether similar facts should have been shown as to the lots described in the deed as redeemed (see *Cardigan v. Page*, 6 N. H. 193; *Pierce v. Richardson*, 37 Id. 315; *Smith v. Bodfish*, 27 Me. 289), we do not deem it advisable now to inquire, as possibly such questions may not arise upon a trial of the case.

If the objection that Sargent's Purchase was never allotted rests merely upon the position that the lots were not actually marked upon the ground, it is not well taken, for an allotment by plan might indicate with certainty the location of each and every lot, although no lot lines had in fact been run out; and if the lots could be made certain, that would be sufficient: *Darling v. Crowell*, 6 N. H. 424; *Smith v. Messer*, 17 Id. 428; *Wells v. Burbank*, 17 Id. 412; *Corbett v. Norcross*, 35 Id. 119; but whether it was ever properly so allotted we cannot decide upon the case before us. If it was material for the defendant

to prove this fact, either for the purpose of showing that the *locus* was not excepted, or for any other reason (see *Smith v. Bodfish*, 27 Me. 289), it would seem that there is better evidence of the allotment than that offered, and no reason is shown why it should not be produced.

The constitution of this state provides in article 44 that "every bill which shall have passed both houses of the general court shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it," etc.; and in article 45, that "every resolve shall be presented to the governor, and before the same shall take effect shall be approved by him," etc. The court will take judicial notice of the fact that David L. Morrill was governor of the state in 1826, and of the genuineness of his signature: 1 Greenl. Ev., sec. 6. Pinkham's Grant was a monument described in the titles set up by each party, and the resolution by which it was granted would seem admissible in determining its location, but there is nothing in the case to show that the grants to Rogers and others, to Green and to Martin, were in any way material.

The defendant claims that Sargent's Purchase is to be run out by the siderial or astronomical meridian, or as it is sometimes called, by the "true" meridian, and not by the magnetic meridian. Unquestionably in this state the courses in a deed are to be run according to the magnetic meridian, unless something appears to show that a different mode is intended in the instrument: 4 Kent's Com. 466, and note; 4 Cowen and Hill's Notes to Phil. Ev. 550; *McIver v. Walker*, 9 Cranch, 177; S. C., 4 Wheat. 444; *Brooks v. Tyler*, 2 Vt. 348; *Owen v. Foster*, 13 Id. 267; *Riley v. Griffin*, 16 Ga. 147 [16 Am. Dec. 726]; *Young v. Leiper*, 4 Bibb, 503; 1 U. S. Dig. 476, note 51; and see *Jackson v. Stoats*, 2 Johns. 352; *Wilson v. Inloes*, 6 Gill, 163; *Clark v. Werthey*, 19 Wend. 324; *Loring v. Norton*, 8 Me. 69; and *Pernam v. Wead*, 6 Mass. 133. We do understand the defendant seriously to question this, but he rests his position upon the use of the word "due" in connection with the words descriptive of the courses, claiming that "due north" means north by a siderial meridian. It is observable that in the description of Sargent's Purchase the last course from the southwesterly corner of Jackson is merely "south," and that the defendant's view, if logically followed out, would seem to require the southern, western, and northern boundary lines of the Purchase to be run out by a siderial meridian, while a portion of the eastern boundary is to be laid down according to

the magnetic meridian,—a result not particularly desirable in point of convenience, or very likely to have been in fact intended by the parties. The word “due” in this connection means merely “exactly,” and in fact adds nothing to the description of the point of compass, for “due north” is exactly north, and so is simple “north.” As the designation of the points of compass is conventional, the word “due” applies with equal propriety to those points as referred to either meridian. We find no evidence that either the law or usage in this state has appropriated the term specially to the siderial meridian. In various cases in our reports, and in many more before our courts, deeds and pleadings have shown a use of the term like that in the deed in question: See *Corbett v. Norcross*, 35 N. H. 100; *Bowman v. Farmer*, 8 Id. 402; yet this is the first time, so far as we are aware, that such an effect has been claimed for it; and we find the word used elsewhere in legal language by courts entitled to the highest respect, without regard to any such distinction as the defendant claims: *Jackson v. Reeves*, 3 Caines, 293; *Brandt v. Ogden*, 1 Johns. 156. We find nothing in the strict meaning of the term, in its popular acceptance, or in its legal or scientific use, or in our own usages or history, to sustain the defendant’s claim, and he has directed us to no authority for his position, which seems to us untenable.

It is impossible for us to ignore the fact, as matter of history and of common knowledge, that in this state private and even town boundaries have almost, if not quite, uniformly been run out according to the magnetic meridian; and we must hold it part of the common law of this state that the courses in deeds of private lands are to be run according to the magnetic meridian when no other is specially designated, and this seems impliedly admitted by the defendant when he places his claim solely upon a supposed effect of the word “due,” which, as we have seen, does not in our view belong to it.

Any resort to proof of the actual intention of the parties or the surveyor would be attended with all the mischiefs which have heretofore by the familiar general rule excluded parol evidence of intention in the construction of deeds, and in our judgment is not permissible. We do not understand that proof was offered of any local custom, and the court in construing a deed can hardly need the aid of opinions from experts in surveying, either as to the meaning of the word “due,” or as to the custom or the common law of this state

in relation to the general mode of surveying. The present method of surveying the public lands of the United States can have no bearing upon the question here, as it was specially adopted, at a comparatively recent date, and long after the system of surveying private boundaries in this state had been established by ancient and long-continued usage, if not originally fixed by the common law. The manner in which extensive public boundaries, like those between states and nations, have been surveyed can have but little weight in the determination of the present question, for in such surveys regard is had to accuracy, permanency, and certainty of verification rather than to the expense or difficulty of the method or its practical convenience or adaptation for common use in our ordinary surveying. As the point in the present case is to be decided according to the law as already established in this state for the determination of private boundaries, the relative advantages of the two systems are not in question before us, but perhaps upon examination it will be found that in practice neither mode gives perfect theoretical accuracy; and where the question of the adoption of a system is open, it would seem a question of relative accuracy and general convenience rather than of entire exactness. We are of opinion that in the grant to Sargent the courses are to be construed as referring to the magnetic meridian, notwithstanding the addition of the word "due" to their description.

The starting-point for ascertaining the bounds of Sargent's Purchase is the northeast corner of Dorcas Eastman's Grant, and the authorities already cited are decisive that in this action at law it cannot be shown that the word "northeast" was inserted in the deed by mistake for "northwest." If nothing more appears, that corner is to be ascertained by looking to the terms of her grant; but if it appears that at the date of the grant to Sargent it had been practically located upon the ground in a manner to bind the parties to it, then the northeast corner as thus located is to be taken as the northeast corner intended in the deed to Sargent: *Hall v. Davis*, 36 N. H. 569; *Breck v. Young*, 11 Id. 489; *Kellogg v. Smith*, 7 Cush. 376. Even if Willey had run a line for the south line of Sargent's Purchase, as it is not in any way referred to in the deed, and as the act of Willey alone could not amount to a practical location of the grant, even if after the execution of the deed, and certainly not if prior to that, this could not control the description in the deed. Whether the northeast corner of

Dorcas Eastman's lot is necessarily the southeast corner of Sargent's Purchase, or merely a point of beginning to run the due west line of three and a quarter miles, and whether that corner of Sargent's Purchase is to be found at the intersection of a line due south from the southwest corner of Jackson, with a due east and west line drawn through the northeast corner of Dorcas Eastman's Grant, it is unnecessary now to inquire. The case is to be discharged.

WHETHER SURVEY IS PRESUMED TO HAVE BEEN MADE BY MAGNETIC INSTEAD OF BY TRUE MERIDIAN. — In the older states, it seems to have been the practice in making surveys to run the lines according to the magnetic meridian, and not according to the true meridian. Where, therefore, there was nothing in the deed or patent to control the call for course and distance, the land was to be taken as bounded by the courses and distances of the deed or patent according to the magnetic meridian: Tyler on Law of Boundaries, 283; *McIver's Lessee v. Walker*, 9 Cranch, 173; S. C., 4 Wheat. 444; *Riley v. Griffin*, 16 Ga. 141; S. C., 60 Am. Dec. 726; *Young v. Leiper*, 4 Bibb, 503; *Wilson v. Inlow*, 6 Gill, 121, 163; *Pernam v. Weed*, 6 Mass. 131; *Taylor v. Shufford*, 4 Hawks, 116; S. C., 15 Am. Dec. 512; *Brooks v. Tyler*, 2 Vt. 348; *Owen v. Foster*, 13 Id. 263. See also *Loring v. Norton*, 8 Greenl. 61, 69; *Jackson v. Carey*, 2 Johns. Cas. 350, 352; *Clark v. Wethey*, 19 Wend. 320, 324. Said Lumpkin, J., in delivering the opinion of the court in *Riley v. Griffin*, *supra*: "If nothing exists to control the call for course and distance, the land must be bounded by the courses and distances of the grant according to the magnetic meridian; for it is the practice, undoubtedly, of surveyors to express in their plats and certificates of survey the courses which are designated by the needle." By the act of Congress, approved May 18, 1796, entitled "An act providing for the sale of the lands of the United States in the territory northwest of the river Ohio, and above the mouth of the Kentucky River," what is known as the rectangular system of surveys was adopted. This system requires that the meridional lines shall be run on the true meridians: Spaulding on Public Lands, sec. 29. Section 2395 of the Revised Statutes of the United States provides that "the public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles." In the states where this system was adopted, of course there can be no presumption that the lines of a survey were run by the magnetic meridian.

JUDICIAL NOTICE. — This topic receives a full treatment in the note to *Lansford v. Mestier*, 89 Am. Dec. 658.

RECORD OF DEED AS DISPENSING WITH PROOF OF EXECUTION: See *White v. Hutchins*, 88 Am. Dec. 766, and note.

DEEDS ARE TO BE INTERPRETED ACCORDING TO THEIR SUBJECT-MATTER, and such construction given to them as will carry out the intention of the parties, when it is legally possible to do so consistently with the language of the instruments: *Schmitt v. Schmitt*, 88 Am. Dec. 681.

NOTICE OF TAX SALE REQUIRED BY STATUTE IS ESSENTIAL TO VALIDITY OF SALE: *Bidwell v. Webb*, 88 Am. Dec. 56.

QUITCLAIM DEED FROM PURCHASER OF LAND SOLD AT TAX SALE IS NOT such an assignment of the certificate of purchase as to authorize the clerk of

the board of supervisors, under the Wisconsin statute, to issue a deed from the county to the grantee in the quitclaim deed: *State v. Winn*, 88 Am. Dec. 689.

PURCHASE BY TAX COLLECTOR AT HIS OWN SALE is not absolutely void, but voidable at the option of the owner of the property: *Pierce v. Benjamin*, 25 Am. Dec. 396.

PAROL EVIDENCE OF CONTEMPORARY NEGOTIATIONS IS NOT GENERALLY ADMISSIBLE in the case of deeds and written contracts: *Hahn v. Doolittle*, 86 Am. Dec. 757, and note 760; *Gelpcke v. Blake*, 83 Id. 418, and note 422.

PAROL EVIDENCE TO IDENTIFY LAND CONVEYED BY DEED: See *Prentiss v. Brewer*, 86 Am. Dec. 730, and note 734, 735.

COPIES OF LOST DEEDS, WHEN ADMISSIBLE IN EVIDENCE: *Pardee v. Lindley*, 83 Am. Dec. 219, and note 223; and see *In re Will of Warfield*, 83 Id. 49.

DEPOSITIONS MUST CONFORM SUBSTANTIALLY TO REQUIREMENTS OF STATUTE: *Simpson v. Carleton*, 79 Am. Dec. 707, and note 716.

OFFICER TAKING DEPOSITION IS PRESUMED TO HAVE AUTHORITY to do so until the contrary appears: *Crane v. Thayer*, 46 Am. Dec. 142.

OBJECTIONS TO QUESTIONS IN DEPOSITIONS BECAUSE LEADING must be made when the questions are propounded, and cannot be made for the first time at the trial: *Donnell v. Jones*, 48 Am. Dec. 59.

CASES
IN THE
COURT OF CHANCERY
OF
NEW JERSEY.

CRAMER v. REFORD.

[2 C. E. GREEN, 267.]

WIFE'S EARNINGS DURING COVERTURE BELONG TO HUSBAND, and he cannot as against his creditors give or agree to give them to her.

REAL ESTATE PURCHASED WITH WIFE'S EARNINGS DURING COVERTURE BELONGS TO HUSBAND, and is subject to be taken for his debts.

VOLUNTARY CONVEYANCE IN VIEW OF GRANTOR'S FUTURE INDEBTEDNESS, and with an intent to place his property beyond the reach of his creditors, is fraudulent as against the creditors, and will be set aside.

HUSBAND IS INCOMPETENT WITNESS FOR WIFE in a civil suit in which she is a party.

BILLS in chancery by judgment creditors of James A. Reford against Reford and his wife, to set aside certain conveyances as fraudulent and void, and to have the land sold to satisfy their judgments. The facts are stated in the opinion.

H. C. Pitney, for the complainants.

McDonald, for the defendants.

By the MASTER. The main point to be determined in these cases is the same, and depends on the same evidence, and they were by consent of parties argued together.

The complainants are judgment creditors of the defendant James A. Reford, and executions issued upon their respective judgments have been levied upon a certain house and lot of land containing about one acre and seventy-five hundredths, situate in Bloomfield township, Essex County, formerly owned in fee by Reford, and by him conveyed to his son, Joseph B. Reford, who conveyed them to the defendant Ann, wife of said James A. Reford, and she now holds the same.

It is charged by the complainants that these conveyances are fraudulent and void as against creditors, because, as it is alleged, they were without valuable consideration, and were made with intent to defraud creditors, and while Reford was in debt, and also with a view to his future indebtedness; and the prayer is, that the deeds may be declared fraudulent and void, and the property sold to pay the judgments.

The answer of Reford and wife denies that the conveyances were made with intent to defraud creditors, and states that they were made upon good and valuable consideration, because, as it is alleged, it had been agreed between Reford and his wife that the property should be hers when he first bought it, and that the conveyance to her was in pursuance of that agreement; and that she had during the coverture bought cows and poultry, and sold milk and fowls, and received the pay for them; and that she had also boarded her children, who, though they lived at home with their father and made a part of his family, yet worked for other persons and maintained themselves; and that the children had at different times made her presents of money, and that it was agreed between her and her husband that she should have the money so paid to her in these different ways in her own right, and appropriate the same to her own use and the support of the family; and that she had expended it in buying furniture and other articles for the family, and also in buying cows, the milk from which she sold as before mentioned; and that without such aid from his children and the industry of his wife, Reford would have been unable to accumulate the means with which he purchased said house and lot, as his earnings would otherwise have been necessarily expended in the support of his family. The answer admits that at the time the conveyances were made Reford was indebted to various persons, but says that those debts have all since been paid. The answer also admits that the conveyance from Reford to his son was mainly for the purpose of having the property conveyed to his wife, but says, nevertheless, that Reford was at that time indebted to his son "about sixty dollars," and that the son was also then in debt to his mother "for board and washing, the amount whereof is not now recollected, and also for some twenty-two or twenty-three dollars, money advanced to him by his mother out of her earnings for the purpose of purchasing railroad commutation tickets for his own use," and that it was agreed that said conveyances should satisfy and

settle such indebtedness. Upon these grounds it is insisted that said conveyances were made upon good and valuable consideration.

The consideration expressed in the deed from Reford to his son, and also in the deed from the son to his mother, is fifteen hundred dollars. But it is admitted that no money or other thing of value was at the time of the conveyance actually paid or delivered by either party to the other.

The value of the house and lot is, according to the evidence, from three thousand dollars to four thousand dollars, and by some of the witnesses is placed still higher. Reford says in his answer that he wished to buy the property in 1849, but could not do so then for want of means, and also because a judgment for about \$446 was then standing against him and others, his co-defendants, in a suit in the supreme court, and that he therefore got Mr. Conger, in 1849, to take a deed for it in his own name. Conger continued to hold the property until that judgment was settled, and then, in the year 1856, conveyed the property to Reford, who held it until the spring of 1858, when he conveyed it through his son to his wife.

The conveyance by Reford to his son must be regarded as only a means used by him to convey the property to his wife, and cannot stand if the conveyance to her was fraudulent.

Was the conveyance to Mrs. Reford made for a good and valuable consideration? The evidence does not show that she had any property at the time of her marriage, or that she has since acquired any by inheritance, gift, devise, or otherwise, except what she received from the sale of milk and poultry, and from her children for their board or as presents. It does not appear that she kept any account of the money so received, nor how much it amounted to in all. And it was spent by her, as the answer states, in procuring furniture and other articles for the use of the family. The money given to her as presents by her children seems to have been inconsiderable in amount, and the testimony in regard to it is vague and unsatisfactory. The allegation that there was an agreement between her and her husband to the effect that the money received by her from the different sources before mentioned should be hers in her own right is not sustained by the evidence; and if she really took the money as her own separate funds, it was all spent, or nearly so, before the deed was executed to her. She had none then in hand to pay over, and she paid none. But even if such agreement had been made, and even if she had kept the money

as her own and paid it over as a consideration for the conveyance, it could not avail to sustain this deed, as against the creditors of her husband, under the circumstances of this case. It was in truth his money. The wife's earnings and the avails of her labor during coverture belong to her husband; and he cannot, as against his creditors, give or agree to give them to her, nor can she justly claim that property purchased with them in her name is hers, and not subject to be taken for his debts: *Skillman v. Skillman*, 13 N. J. Eq. 403; *Belford v. Crane*, 16 Id. 265 [84 Am. Dec. 155].

I am of opinion, therefore, that the conveyance to Mrs. Reford cannot be sustained upon the ground that it was for a good and valuable consideration.

Is the conveyance void by reason of the indebtedness of Reford at the time of its execution, or because it was made in view of his future indebtedness, as charged by the complainants?

There is evidence that Reford was at the time of that conveyance in debt to several different persons. Some of those debts, but not all, have since been paid. Among those not paid is the debt of about one hundred dollars due to Ehlers for teaching his daughters music. For the rent of the Pocahontas mill (hereinafter mentioned), which accrued from October, 1858, to April, 1859, Reford gave his note, indorsed by Corwin, one of the complainants, at his request, to Mr. Kay, and the note having been duly protested for non-payment, and Corwin becoming fixed as indorser, he was compelled to pay it; and the sum so paid by him is a chief part of the claim on which his judgment against Reford was recovered. The complainants insist, and I think correctly, that this should be considered as an indebtedness existing prior to and at the time of the conveyance to Mrs. Reford. It is a part of the debt which by the lease he bound himself to pay. The obligation to pay rested on him before and at the time of the conveyance, though this portion of the rent did not accrue till afterwards. Nor does it make any difference that Corwin by paying off the note he had so indorsed became the creditor of Reford in the place of the original payee. The obligation resting upon Reford was not thereby in any wise changed except as to the person to whom the debt was to be paid.

I will not remark further upon the indebtedness existing at the time of the conveyance, but will consider whether or not it was made in view of future indebtedness.

In the spring of 1858, some time in the latter part of the month of February, Reford commenced a negotiation for a lease of a paper-mill near Morristown, known as the Pocahontas mill, and it was continued through March and down to the 1st of April, when a lease dated on that day was executed between him and John C. Kay, whereby the mill and its appurtenances was leased by Kay to Reford for four years, commencing on that day, at a rent of \$960 a year, payable half-yearly. Reford was also to pay the taxes, and keep the machinery and premises in as good repair as they then were, and to pay the expense of insuring the mill against loss or damage by fire. The machinery was old, and not in good repair at the time of making the lease. Reford entered into possession under the lease, and ran the mill until about the middle of April, 1859, when he gave it up, and went into business elsewhere. His business while at the mill resulted in a loss to him, caused, as he alleged, by an unusual scarcity of water, but said by others to be owing to the machinery being old and out of repair. It is certain, however, that he was unsuccessful, and that while running the mill he contracted debts, which yet remain unpaid, to a considerable amount, and among them are the debts of some of the complainants, and for which their judgments were obtained. Upon an execution issued upon Corwin's judgment, he was arrested, and thereupon applied for the benefit of the insolvent laws, and after much litigation and delay, he was at length discharged as an insolvent debtor. When he rented the mill he had little if any property besides the house and lot at Bloomfield and his household furniture there. He had no capital or means even to buy the necessary stock for the purpose of manufacturing paper and carrying on the mill, for he bought it on credit, or with money raised on notes indorsed for him, or lent to him by others. In this situation he stood when about to commence business at the mill under a lease for four years at an annual rent of \$960, besides payment of taxes and cost of insurance, and the expenses of keeping the machinery and premises in repair. It was to a man in his circumstances an undertaking attended with some hazard, to say the least, and one in which he must certainly incur debts, in addition to his rent, and which in case he should not be successful he would have no means whatever to pay, except his property at Bloomfield. Yet, just before he executed that lease, and after he had agreed to take it, he began to take steps to convey away his house and lot,

which, except his household goods, was all the property he had.

The deed from him to his son is dated the 25th of March, 1858, and it was, according to the certificate of acknowledgment indorsed upon it, acknowledged on the 1st of May following by Reford and his wife. But Mr. McDonald, who drew the deed, and before whom the acknowledgment was taken, and who was called as a witness on the part of the defendants, says that he thinks it was signed and acknowledged by Reford on the day it bears date, and that Mrs. Reford was not then present, but came afterwards and signed and acknowledged it on the first day of May, and that he then wrote the certificate of acknowledgment the same as if they had both acknowledged it on that day. Mr. McDonald further says that when he received instructions to draw the deed from Reford to his son, he was at the same time instructed to draw the deed from the son to Mrs. Reford, and was also directed to hold the deed to the son as an escrow until Mrs. Reford signed it, and that he did so hold it until the 1st of May. The deed to the son was therefore not fully delivered, and did not operate as a conveyance until that time.

The deed from the son to his mother is dated on the 8d of May, 1858, and was acknowledged the next day. Both deeds were recorded on the 17th of that month.

The testimony shows clearly that about the time the deeds were delivered, and also afterwards, Reford represented to different persons with whom he was dealing that he was the owner of the house and lot in question, and that it was clear of encumbrance; and he obtained credit, and accommodation indorsements, and discounts of notes, by that means. It seems to me, in view of the evidence, and of all the circumstances attending the transaction, that this is a plain case of a conveyance in view of future indebtedness on the part of Reford, and with an intent to place his property beyond the reach of his creditors in case the business in which he was about to embark should be unsuccessful. Such a conveyance is fraudulent as against creditors, and will be set aside in this court: *Reade v. Livingston*, 3 Johns. Ch. 500 [8 Am. Dec. 520]; *Beeckman v. Montgomery*, 14 N. J. Eq. 106 [80 Am. Dec. 229].

There is strong evidence of fraud upon the very face of the transaction, and without looking into the testimony which was offered of the declarations made by Reford about the time he was preparing to lease the mill. Mr. Ehlers expressly

states that Reford told him about that time that persons at Morristown advised him not to risk his property at Bloomfield in that undertaking, and that he ought to convey it to his wife. And Mrs. Reford, who was present at this conversation, expressed the same views, and wished to have the property conveyed to her in order to put it beyond the risks of the business. And the witness says further that about two months after that they told him it had been done. This witness is, however, contradicted on this point as well as others by both Reford and his wife, who were called and examined as witnesses for the defense, but under objection made at the time to their competency. I think that Reford was not a competent witness, and that his testimony must be excluded. He is testifying in favor of his wife in a civil suit in which she is a party. The husband and wife cannot be witnesses for or against each other where either is a party in a civil suit: *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 131, and cases there cited; *Bird v. Davis*, 14 Id. 437.

The testimony of Mrs. Reford, it may be said, stands on a different ground, as she is testifying in her own behalf, in defense of her own claim to real estate, the title whereof is now vested in her, and in which her husband has no right or interest unless it be as tenant by the curtesy initiate, which will be perfected only upon the contingency of his surviving her. Her testimony is objected to on other grounds. But I do not think it necessary to consider them, for even if her testimony be admitted, and its full force given to it in the particulars in which she contradicts Ehlers, I think that the other evidence in the case clearly shows that the conveyance to her by her husband through her son was in view of future indebtedness, and for the purpose of placing the property beyond the reach of creditors.

I am therefore of opinion that the conveyance from Reford to his son, and from the son to Mrs. Reford, should be declared to be fraudulent and void, and be set aside; and that the complainants' judgments should be declared to be liens upon the house and lot in question, and that the property should be sold to satisfy the amount due upon them respectively (subject, however, to Mrs. Reford's right of dower), and that it should be referred to a master to ascertain and state the amounts due upon the judgments respectively, and their order in regard to priority; and that further directions be reserved till the coming in of the report. And I respectfully recom-

mend to the chancellor to make an interlocutory order and decree accordingly.

The principal case as it first came before the court is reported in *Voorhes v. Reford*, 14 N. J. Eq. 155. A case arising out of the insolvency proceedings referred to in the principal case is *Reford v. Cramer*, 30 N. J. L. 250.

WIFE'S EARNINGS DURING COVERTURE BELONG TO HUSBAND: *Stillman v. Stillman*, 82 Am. Dec. 279, and note; *Belford v. Crane*, 84 Id. 155, and note. The avails of a wife's labor in her husband's business belong to the husband: *Clinton Station etc. Mfg. Co. v. Hummel*, 25 N. J. Eq. 47; and the fact that part of the purchase price of land bought by and conveyed to a husband was the earnings of the wife during coverture gives her no claim against him or against the proceeds of the sale of the property: *Persons v. Persons*, 25 Id. 259; so services rendered by a wife in the course of the discharge of her duty as a wife do not constitute a valid consideration for a conveyance of land to her as against her husband's creditors: *Carpenter v. Carpenter*, 25 Id. 197; and even if the New Jersey act for the better securing the property of married women gave the wife capacity to accept a gift of earnings in her husband's business from her husband, she could not retain such gift any more than could a stranger as against his creditors: *National Bank v. Sprague*, 20 Id. 25. The principal case is cited to the foregoing points. But see it criticised in *Peterson v. Mulford*, 36 N. J. L. 489, on the point that a husband may permit his wife to labor for herself, and appropriate to her own use the avails of her labor, or give the same to her, and such permission or gift is good as against his creditors; and see also *Tresch v. Wirtz*, 34 N. J. Eq. 127.

VOLUNTARY CONVEYANCE WITH INTENT TO HINDER, DELAY, OR DEFRAUD FUTURE CREDITORS WILL BE SET ASIDE: See *Beekman v. Montgomery*, 80 Am. Dec. 229; *Belford v. Crane*, 84 Id. 155; *Mullen v. Wilson*, 84 Id. 461, and the notes thereto. The principal case is cited to this effect in *National Bank v. Sprague*, 20 N. J. Eq. 25; *Clayton v. Mess*, 30 Id. 213; *City National Bank v. Hamilton*, 34 Id. 161.

HERBERT v. MECHANICS' BUILDING AND LOAN ASSOCIATION.

[2 C. E. GREEN, 497.]

JUDGMENT CREDITORS DO NOT OCCUPY VANTAGE GROUND OF BONA FIDE PURCHASERS for a valuable consideration without notice in the marshaling of securities.

CREDITOR'S RIGHT TO MARSHAL SECURITIES IS ABSOLUTE AGAINST DEBTOR HIMSELF, and cannot be impaired or affected by the subsequent intervention of other creditors.

EQUITY OF SECOND MORTGAGEE TO HAVE SECURITIES MARSHALED, so that the debt of the first mortgagee shall be paid primarily out of shares of stock assigned to the first mortgagee as collateral security, cannot be impaired or affected by the subsequent intervention of judgment creditors of the mortgagor in levying upon the shares of stock.

BILL to foreclose a mortgage. The facts are stated in the opinion.

A. V. Schenck and J. P. Stockton, for the appellant.

Strong and Leupp, for the respondents.

By Court, BEASLEY, C. J. The bill in this case was exhibited by the Mechanics' Building and Loan Association of New Brunswick, to foreclose a certain mortgage given to it by John B. Conover. At the time of the execution of this instrument the mortgagor was a corporator, and in compliance with a requirement to that effect in the charter of the company, assigned to it ten shares of its capital stock, of which he was the owner, as collateral security to the mortgage debt. Subsequent to the creation of these securities, Conover executed a second mortgage on the same premises included in the first mortgage, and embracing also certain other lands, to John B. Herbert, the appellant, and at a still later date, being in failing circumstances, he conveyed the mortgaged premises in fee to the appellant. Several judgments having been afterwards obtained against Conover, by virtue of executions issued thereon, the ten shares of stock above mentioned were levied on.

It is obvious that this conjuncture of facts presents for consideration the equitable conditions of the ten shares of stock arising out of the claims of the appellant, Herbert, and those of the judgment creditors.

This stock is a pledge in the hands of the Mechanics' Building and Loan Association, and is collateral to their mortgage. The right of this company to resort, if necessary, for the collection of the debt due them to both the mortgaged premises and the stock is admitted; but Herbert, as second mortgagee of the land, and owner of the equity of redemption, insists that the company should be compelled to exhaust the stock before going to the land. On the other hand, the judgment creditors contend that, by the established rules of equitable distribution, the converse of this should be done, and that the land, being the primary security, should be first applied.

The due settlement of this point of dissension would seem to depend entirely on the fact whether the equitable rights of the appellant were at the time of the rendition of the judgments so fixed and established as not to be liable to be affected by the subsequent action of third parties. It is quite certain that at such time the appellant had the right in equity to require the first mortgagee to look primarily to the stock in question. Before the judgments were entered, the relative condition of the first and second encumbrancer was clear, defi-

nite, and in every respect incontestable. The circumstances as they then stood presented with entire simplicity the ordinary case of the elder creditor possessed of two securities, only one of which was subject to the lien of the junior creditor; the right, therefore, of the latter to demand that the former should apply in the first place the security peculiar to himself falls within one of the most familiar principles by which justice is dispensed in courts of equity. The sole inquiry, then, as above intimated, seems to be, Did the entry of the judgments and the levy by execution on the stock disturb these equitable relations?

As introductory to all reasoning on this subject, it is proper to premise that judgment creditors do not occupy the vantage-ground of *bona fide* purchasers for a valuable consideration without notice. That an honest and innocent purchaser of the stock in question after the equities of the second mortgagee had attached to it would hold it discharged from such latent equities, I entertain no doubt. This was the ground of decision in the case of *Reilly v. Mayer*, 12 N. J. Eq. 55. Assuming, what perhaps is not entirely unquestionable, that the purchaser in that case acquired the property without notice, either actual or constructive, of the prior equities, that adjudication rests in satisfactory reasons. It bears strict analogy to that class of cases which sustain the proposition that if the holder of the two funds, only one of which is common to himself and another creditor, release the common fund, in such case, in the event of the security retained proving insufficient to the payment of both claims, the loss will not fall on the elder creditor executing the release, provided he acted in good faith, and in ignorance of the subordinate rights. Every fair purchase has always been protected by the law with peculiar diligence. This results in part from the nature of the transaction, and to a certain extent from considerations of general convenience. He who pays the price on a sale justly, and with honest intentions, acquires, in natural morality, the highest possible title to the thing purchased; and it has, at least in modern times, been considered highly promotive of the public welfare that the circulation of property should be free from secret liens and latent trusts. Hence the doctrine, so much favored in a court of equity, of the inviolable nature of the defense of a *bona fide* purchase without notice for a valuable consideration. But a creditor who has done nothing more than to convert his debt, subsisting in the form of a con-

tract, into a judgment has no claim but that of diligence to the favor of equity. Neither natural justice nor public policy enacts a preference for him over adverse claimants. He has consequently never been treated as a purchaser for value. He can, under his judgment, levy on execution all that belonged to his debtor, but he can take nothing more. He simply represents the debtor, and he takes the property as the debtor held it. This is the language of the authorities. Thus in *Newlands v. Paynter*, 4 Mylne & C. 408, the interest of the *cestui que trust* was protected against the judgment creditor of the trustee. In *Lodge v. Lyseley*, 4 Sim. 70, the equitable interest of the purchaser for value before conveyance was preferred to the claim of the judgment creditor of the vendor. And in *Whitworth v. Gaugain*, 3 Hare, 416, it was explicitly held that a judgment creditor is not a purchaser for value in the contemplation of a court of equity.

Regarding, then, the liens of the executions in this case as destitute of those qualities which impart excellence and give preference to the equity of a purchaser, upon what ground is it that the securities in question are to be marshaled in favor of the creditors by judgment? The circumstances are such that all the parties interested must of necessity appeal to the equitable discretion of the court. Their relative positions are these: the complainants, who are possessed of two securities,—the mortgaged land and the shares of stock,—are in a court of equity praying that they may be aided to make their debt out of one or both funds; the appellant is also present, setting up his mortgage on the land, and requesting that the complainant's debt should be cast as far as practicable on the stock; the judgment creditors at this point intervene, and insist that this stock shall be preserved for them. It is obvious that the legal right is in the complainant, the building and loan association, to appropriate whichever fund it may see fit, and thus disappoint at will either claimant. The second mortgagee and the judgment creditors both, as their sole means of protection, apply to the power of the court to control this arbitrary discretion of the company, and conform it to the standard of equity. As the court is thus bound to arbitrate and dispense these funds among the rival litigants, the sequence would seem to be undeniable that such distribution must be altogether equitable, and in strict harmony with the maxims which prevail in a court of conscience. The claimants in this case are all creditors; their rights, therefore, do not differ

in kind. But the appellant obtained the first equity; and it is an established axiom, when the equities are equal, priority in time entitles to the preference. Can the judgment creditors displace this prior equity? Why? But for them the appellant would have obtained without question what he claims. Until they intermeddled, his interest certainly was not defensible either by the willful action of the mortgagor or that of the prior mortgagee. It has been noted that his equity could not have stood against the eminent superiority of a *bona fide* purchaser. But it is difficult to imagine why he is to give way to a creditor who has merely obtained a judgment. It is certain that, as a general thing, equitable interests are not thus subordinated to after-acquired liens. The instance before referred to, of the purchaser of real estate who has paid the consideration before obtaining a conveyance being protected against a judgment subsequently taken against his vendor, is an illustration of the usual course of proceeding. It is undeniably true that assets will not be marshaled to the injury of a party over whom he who asks the aid of the court has no advantage. But here the appellant has the advantage in point of time; and it is the judgment creditors who demand that superiority of effect shall be given to their equity, which is subsequent. To make judgments thus paramount to prior equitable liens would be to establish a rule of very great practical importance, and one which would be possessed of most comprehensive energy. It would be difficult to restrain it, if system be preserved, within narrower bounds than the whole field of marshaling assets and securities. And yet it can scarcely be applied to one section of such field without incongruity with adjudged cases. That after-acquired rights give place to precedent ones is the general gradation established by a long line of adjudications. If a judgment creditor by specialty absorb the personal estate of the decedent to the detriment of legatees, the latter will be subrogated to the rights of the former; that is, the equity of the legatees as it existed at the death of the testator, to require the specialty debts to be raised out of the land in which they have no interest, instead of out of the personalty, which is the fund to which they look for payment, cannot be defeated at the mere volition of a creditor: *Hanby v. Roberts*, Amb. 128. So, where lands were mortgaged, and a part of them afterwards sold by the mortgagor, it was held that the part so purchased was not bound to contribute to the payment of the mortgage in

relief of a party who had purchased the residue of the premises under a sale made by force of a judgment later in time than the first conveyance; that is, such judgment and sale were not permitted to affect the prior equities: *Gill v. Lyon*, 1 Johns. Ch. 446. And again, to the same purport, is the case of *Reynolds v. Tooker*, 18 Wend. 591. The question there was, whether a judgment against a ship-builder should in the first instance be cast on a vessel which had been bought and paid for, but not delivered, before the entering of the judgment, in order to leave other property for the satisfaction of younger judgments; but the court rejected the application on the ground that the equities of those who had paid for the vessel attached before such younger judgments, and that the precedent right could not be divested by any diligence of creditors, or any act in their favor by the debtor, which was subsequent.

In *Averall v. Wade*, Lloyd & G. 252, the same principle was adopted. In that case, a party, being seised of several estates, and indebted by judgment, settled one of them for valuable consideration, with a covenant against encumbrances, and subsequently confessed other judgments. It was under these circumstances held that the prior judgments should be thrown on the unsettled estates, and that the latter judgment was possessed of no equity which could override that of the parties taking under the settlement. Sir Edward Sugden, who decided this case, sums up his reasoning on this point in these words: "The result on the whole is, that there is no right to throw any part of the first judgment on the settled estate, but that on the contrary that estate had a right to be indemnified against it at the expense of the unsettled estates, and no subsequent judgment creditor can disturb that right after it has once attached." For further recognition and exemplification of the same doctrine, see the following cases: *Withers v. Carter*, 4 Gratt. 407 [50 Am. Dec. 78]; *Ziegler v. Long*, 2 Watts, 205; *Bruner's Appeal*, 7 Watts & S. 269; *Wise v. Shepherd*, 13 Ill. 41.

The rule established by these decisions will upon examination be found to be that the right of the creditor to marshal the assets of the debtor is absolute as to the debtor himself; and that although it is subject to the legal and equitable claims of prior creditors, it cannot be impaired or in any respect injuriously affected by the intervention of those of a later date. This course of adjudication seems to me correct in principle

and salutary in its operation, and I therefore am constrained to think that the decree appealed from is erroneous, in failing to enforce the superior equity of the appellant to have the stock primarily appropriated to the satisfaction of the first mortgage.

The point above discussed appears to have been considered a subordinate one in the court below, the important questions being those which relate to the rights of the parties springing out of the organisation and by-laws of the building and loan association. In the views entertained by the chancellor upon these several matters, I fully concur, and think the decree should be reversed only in the particular above specified.

THE PRINCIPAL CASE as it first came before the court is reported in *Mechanics' B. & L. Assoc. v. Conover*, 14 N. J. Eq. 219.

MARSHALING SECURITIES, DOCTRINE OF, WHEN APPLIED: See *Dickson v. Chorn*, 71 Am. Dec. 382, and note collecting cases; *General Ins. Co. v. United States Ins. Co.*, 69 Id. 174; *Carter v. Neal*, 71 Id. 136; *Doyle v. Murphy*, 74 Id. 165. A subsequent mortgagee has an equity to require a prior mortgagee to first resort to stock assigned to the latter as collateral security for the debt secured by the mortgage: *Washington B. & L. Assoc. v. Beaghen*, 27 N. J. Eq. 101; *Phillipsburg Mutual L. & B. Assoc. v. Hawk*, 27 Id. 356; and see *Bergen Savings Bank v. Barrows*, 30 Id. 95; and this equity will not be defeated by a levy on the stock under a judgment against the mortgagor: *Phillipsburg Mutual L. & B. Assoc. v. Hawk*, *supra*. The principal case is cited to the foregoing points.

THE PRINCIPAL CASE IS ALSO CITED IN *Woodside v. Adams*, 40 N. J. L. 490, to the point that a judgment creditor by his levy on mortgaged chattels will acquire a preference according to his legal priority.

JONES v. JONES.

[3 C. E. GREEN, 32.]

IN ACTION FOR DIVORCE ON GROUND OF ADULTERY, where the defense set up is the counter-charge of adultery, the facts constituting such defense must be fully and plainly set forth in the answer.

IN ACTION FOR DIVORCE ON GROUND OF ADULTERY, the court cannot entertain any matter not properly put in issue, on the ground that public policy and public morals require it.

ACTION OF ADULTERY COMMITTED BY HUSBAND, and forgiven for years, should not be held to compel him to submit without redress to the faithlessness and unrestrained profligacy of his wife.

WHERE PARTY COMMITTING ADULTERY is received back and forgiven, the marriage contract is renewed, and begins as *res integra*, and it is for the party, and not the court, to forgive a new offense of like character.

THE opinion states the facts.

Larrison, for the petitioner.

Keasbey, for the defendant.

By Court, GREEN, Chancellor. The petitioner applies for a divorce from his wife, the defendant, on the ground of adultery. The parties were married in this state in 1851, and were both residents of this state at the time of the alleged adultery and of the filing of the petition. There is no question as to the jurisdiction of the court.

The adultery is alleged to have been committed in March, April, May, and June, 1865, at Hoboken and in New York. The first question in the case is one of fact, whether the adultery is proved.

I can have no doubt as to the adultery. No one can read the testimony of Rosanna Lehman, Mary Bolen, Eliza Deigheur, and Kate O'Neill, and doubt it. The defendant and her alleged accomplice, William H. Marvin, deny it under oath. But the facts and circumstances sworn to or admitted by them, standing alone without any other evidence, would excite great suspicion, if not alone sufficient to convince any one of their guilt. And the explanations they attempt of their long-continued and peculiar intercourse, and the circumstances attending it, are too thin and transparent a disguise to deceive or mislead for a moment. The adultery is established. The only defense is recrimination, charging the complainant with having committed adultery. This is a good defense if properly brought before the court, and true in fact, and not condoned. The statute makes it so: *Nixon's Digest*, 224, sec. 5.

But in this case the defense is not set up in the answer, and the facts upon which the defense is founded were, if true, known to the wife before the suit. The question then arises, Must this defense be pleaded or set up in the answer? The ordinary rules of pleading at law and in equity would seem to require that it should be; and the decisions in the English ecclesiastical courts, and in the courts of the different states where it has been discussed and adjudicated, require it to be set up in pleading; the only exception seems to be when the complainant in putting his case shows his own guilt: *Bishop on Marriage and Divorce*, sec. 408; *Foster v. Foster*, 1 Hagg. Const. 144; *Brisco v. Brisco*, 2 Add. Ecc. 259; *Smith v. Smith*, 4 Paige, 432 [27 Am. Dec. 75]; *Pastoret v. Pastoret*, 6 Mass. 276; *Wood v. Wood*, 2 Paige, 108; *Morrell v. Morrell*, 3 Barb. 236.

And the statute (*Nixon's Digest*, p. 225, sec. 16) says ex-

pressly that the "answer shall fully and plainly set forth the causes of his or her defense." The answer in this case sets up the defense that the defendant is not guilty of the adultery, but nowhere in any way charges the petitioner with adultery on his part. This defense, given by the same statute, is nowhere clearly or plainly set up, and is a very different defense from that pleaded. This is a suit *inter partes*; and the court cannot lay hold of any matter not properly put in issue, on the ground that public policy and public morals require it. Collusion of the kind where both parties conspire to impose upon the court, and fraudulently to procure a release from their marriage vows against the provisions and policy of the law, is a very different case.

But if the defense was properly proved, there is a very serious question whether it is proved sufficiently to bar the petitioner's claim to relief. The only proof attempted is by showing that the petitioner had the venereal disease three times; once at Montville in 1855, again at Montville in 1856, and the third time at Newark in April, 1862. The proof is strongest as to the years 1855 and 1856. Yet there are many circumstances that throw very grave suspicion over the proof as to those two occasions. I lay the defendant's testimony out of consideration as entirely unworthy of credit; that of the two women is too uncertain; and the whole depends on the proof of the two Gradsons. If Timothy Gradson is to be heard, and he is not impeached or contradicted, it would seem that the petitioner had the venereal disease in 1856, and proof of that disease, clearly made out and not explained, is proof of adultery. The proof of this disease in 1862 is not sufficient. It depends upon the evidence of the defendant and Dr. Tichenor; and the value of the testimony depends entirely upon the truthfulness of the defendant. Her statement is essentially different from his; and her testimony, if not so contradicted, would not be sufficient to establish this defense against the oath of the complainant.

But if I was entirely satisfied with the proof of this disease in 1856, and without the grave doubts which I entertain, the defense is met by the fact of condonation. Mrs. Jones says she knew of this disease at the time, and how it was contracted, and she has lived with the complainant and had two children by him since. It is twelve years ago, and eight years before he went to the war, in 1862. This presents a clear case of condonation. If the adultery was clearly

proved, the fact of condonation is placed beyond doubt, and this would raise the question whether condoned adultery of the plaintiff will bar his application for a divorce for adultery of his wife.

On this question the authorities, both in England and this country, are conflicting and undecided: Bishop on Marriage and Divorce, secs. 405-407; Shelford on Marriage and Divorce, 442; *Beeby v. Beeby*, 1 Hagg. Const. 789; *Anichini v. Anichini*, 2 Curt. Ecc. 210; *Wood v. Wood*, 2 Raige, 108; *Morrell v. Morrell*, 1 Barb. 318; S. C., 3 Barb. 236.

But notwithstanding the statute does not expressly limit the bar to uncondoned adultery; I should be much inclined, if compelled to decide the question, to coincide with Bishop in his remarks in section 407 a, and with Dr. Lushington in his views expressed in *Anichini v. Anichini*, *supra*, and to hold that an act of adultery committed by the husband and forgiven for years should not be held to compel the husband to submit without redress to the faithlessness and unrestrained profligacy of his wife; the penalty is too severe for a forgiven offense. It is better to hold that when the erring party is received back and forgiven, the marriage contract is renewed, and begins as *res integra*, and that it is for the party, and not for the courts, to forgive the new offense.

On either of these two grounds, I think in this case the bar of the adultery of the petitioner must fail as a defense.

The divorce *a vinculo matrimonii* is decreed.

IN ACTION FOR DIVORCE ON GROUND OF ADULTERY, where adultery is set up by way of recrimination, the answer should state the time when, the place where, and if known, the person with whom, the offense was committed: *Marsh v. Marsh*, 84 Am. Dec. 164, and note 168.

IN ACTION FOR DIVORCE ON GROUND OF ADULTERY, to enable defendant to avail himself of condonation as a defense, he must specifically set it up, either by plea or answer: *Warner v. Warner*, 31 N. J. Eq. 225, citing the principal case.

ADULTERY SET UP IN RECRIMINATION, if properly pleaded and proved, is a good bar in an action for divorce; but the party with whom the offense was committed must be named, or in some way described, or the time, place, or circumstances must be given, identifying the act in such manner that the charge intended can be identified and repelled: *Reid v. Reid*, 21 N. J. Eq. 333, citing the principal case.

IN ACTION FOR DIVORCE, the court can exercise no greater power than it can in any other class of actions. It cannot entertain any matter not properly put in issue, on the ground that public policy and public morals require it: *Fuller v. Fuller*, 41 N. J. Eq. 201, citing the principal case.

CONDONED ADULTERY AS RECRIMINATIVE BAR FOR DIVORCE FOR ADULTERY ON PART OF CONDONING PARTY.—The first time this subject received judicial consideration appears to have been in the case of *Beeby v. Beeby*, 1 Hagg. Ecc. 789; S. C., 3 Eng. Ecc. 338. This was a case where the husband sought a divorce for the adultery of the wife, and she in recrimination pleaded adultery on his part. This she proved, and also that she separated from him long before she committed adultery; but it also appeared in proof that she returned and lived in the same house with him after the separation; and Sir William Scott (Lord Stowell), in delivering the opinion of the court, held that the return to the husband's house after separation from him on account of his adultery was not such condonation on the part of the wife as to extinguish her right to set up his adultery as a bar to his prayer for divorce. However, in the subsequent case of *Anichini v. Anichini*, 2 Curt. Ecc. 210, S. C., 7 Eng. Ecc. 85, a suit for restitution of conjugal rights by the wife, wherein the husband pleaded her adultery in bar, and also prayed a separation, the wife then recriminated by charging the husband with adultery, and asked for a separation. Dr. Lushington, who delivered the opinion, being convinced that the wife had been guilty of gross adultery, and that the husband's adultery with one person long before had been fully condoned, pronounced for a separation at the prayer of the husband. Such was the English law upon this subject prior to 1857, at which time a statute was passed (20 & 21 Vict.), c. 85, sec. 31, of which vests a great discretion in the court in matters of this kind, and provides that the court shall not be bound to pronounce a decree of divorce if it shall find that the petitioner has been guilty of adultery during the marriage. Since the enactment of this statute, there is a conflict in the English cases, arising perhaps, as it did before the passage of the act, through the peculiar circumstances of each particular case. In *Seller v. Seller*, 1 Swab. & T. 482 (1859), we find the court following and approving the rule laid down in *Anichini v. Anichini*, *supra*, and deciding that the condoned adultery of the wife and petitioner is not a bar to her action for divorce for the subsequent adultery of the husband. On the other hand, the courts, exercising the discretion vested in them by the statute, have in a majority of cases held the contrary doctrine, namely, that adultery condoned by the petitioner is a bar to an action for divorce based upon the adultery of the defendant: *Goode v. Goode*, 2 Swab. & T. 253 (1861); *Clarke v. Clarke*, 34 L. J., N. S., 94, Prob. Mat. & Adm. (1865); *Morgan v. Morgan*, L. R. 1 Pro. & D. 644 (1869); *McCord v. McCord*, L. R. 3 P. D. 237 (1875).

In this country, whenever the question has received consideration at the hands of a court, it has been almost universally held that the rule expressed in *Anichini v. Anichini*, *supra*, is an exposition of the true principle which should govern in such cases, and the doctrine as laid down in the principal case has been adopted and followed. Thus in *Masten v. Masten*, 15 N. H. 159, it was held that proof of adultery on the part of petitioner is not a bar to an action for divorce, based upon the subsequent adultery of the defendant, if there has been an intervening condonation of the crime of the petitioner. The same view is expressed in *Morrell v. Morrell*, 1 Barb. 319; *Wood v. Wood*, 2 Paige, 108; *Bleck v. Bleck*, 27 Hun, 296-299; and see *Smith v. Smith*, 4 Paige, 432; S. C., 27 Am. Dec. 75; *Cumming v. Cumming*, 135 Mass. 386; S. C., 46 Am. Rep. 476. In the latter case, it was held that the husband's condonation of the wife's adultery is not a bar to an action of divorce by her because of his subsequent adultery. The court in this case goes into a thorough and extended review of the question and the authorities relating thereto. And after speaking of the discretion placed in the hands of the English courts

by virtue of the statute above mentioned, 20 & 21 Vict., c. 85, sec. 31, the court say that, "while it is true that in some cases more exact justice might be done between the parties by the exercise of such discretion, it is better that such authority should be conferred by the legislature, if it deems it expedient, than that it should be assumed by the court. We are more inclined to deal with the question as one of principle, and to seek for the general rule by which this case and other cases presenting similar facts should be governed. . . . The whole doctrine of condonation goes upon the ground that there is in law no such thing as an unpardonable offense against the marriage relation. Even adultery is not universally found to be unpardonable in actual experience, and it should not be deemed to be so in law. It is an offense which may, at the option of the injured party, serve as a ground for divorce, or it may be overlooked and forgiven. The course to be pursued is a matter to be determined when the facts become known. The question then presents itself. The opportunity is afforded for a separation, — for an escape from the marriage relation, with its duties and burdens and indignities, and it may be its oppressions and cruelties; and there is also the chance, the possibility, of some degree of comfort and happiness from a united family, and of substantial advantages springing from a continued union. Various motives may prompt the injured party to endure the sense of wrong, and to condone the offense. They may have children whose welfare will be promoted. Affection undestroyed, though shaken, and confidence that the error will not be repeated, may lead to a full and free forgiveness. In the case of a married woman who has no other home or resource, condonation may be more readily granted from the stress of circumstances. Or in the case of the husband of a rich wife, pecuniary interest, and the advantage of a comfortable support in the future, may prove sufficient solace for wounded honor. A thriftless husband, by condoning a marital offense, may secure for himself a maintenance for years out of the fortune of his wife, and thus by deliberate purpose reap a substantial pecuniary advantage from his deliberation not to seek a divorce. This would not differ much, as far as he is concerned, from condoning the offense for a direct consideration in money.

"But whatever the motive, if one who is under no stress of circumstances, but is free to act in either way, and who has a full understanding of all the facts, deliberately and freely elects to condone the offense, and to take the real or supposed advantages which are supposed to arise therefrom, it is better to hold as a general rule that the day for legal complaint is past, and that the mouth of the injured party ought thereafter to be sealed as to that particular offense, unless a similar offense is repeated in the future. To hold otherwise would operate to some extent as an encouragement or license to the condoning party to commit offenses against the marriage relation; and would also tend to give a constant sense of inequality between the parties in respect to their legal rights. All condonation is in a sense conditional; that is, there is an implied condition that the same offense shall not be repeated. It is not, however, attended with the further condition that the offender shall be disqualified from thereafter alleging any ground of complaint for subsequent misconduct against the condoning party. No such inequality should be established by an arbitrary rule of law applicable to all cases. Condonation restores equality before the law. If the injured party is willing to forgive the offense, the law may well give full effect to such forgiveness, and not extend to such party the temptation, the encouragement, the license to run through the whole calendar of matrimonial offenses without redress at the hands of the other party.

"We have not overlooked the consideration that an original adultery by a libellant may have the effect to weaken the sense of the obligation of the marriage contract on the part of the libelee, and that for this reason a divorce under such circumstances ought to be refused. This consideration is of weight, and would deserve special attention if judicial discretion were to be exercised in determining a case; but it is not sufficient to overcome the controlling reasons in favor of the establishment of a general rule to the contrary." The opinions of legal writers as expressed upon principle are in full accord with the views last set forth above: 2 Bishop on Marriage and Divorce, sec. 100; Schouler on Husband and Wife, sec. 539; Stewart on Marriage and Divorce, sec. 314.

HAWRALTY v. WARREN.

[3 C. E. GREEN, 124.]

UNILATERAL OR OPTIONAL CONTRACT TO CONVEY LAND or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy or consideration, will not be enforced in equity; but if made upon proper consideration, or if the consideration forms part of the contract or lease, it may be enforced.

MISTAKE AS TO LEGAL EFFECT OF AGREEMENT by defendant will not relieve him, unless led into it by fraud or representations of complainant.

IN AGREEMENT TO CONVEY, WORDS that party "shall have the privilege of purchasing" are sufficient in equity to entitle him to a conveyance of all the estate of the vendor at the time of the contract, although such words are not so comprehensive as a positive agreement to convey, which means, when not qualified by words or circumstances, to convey the fee.

WHERE UNDER CONTRACT TO CONVEY the vendee requires a marketable title, and the wife of the vendor refuses to join in the conveyance, equity will not compel the vendor to procure a conveyance or release by his wife, or require him to furnish indemnity against her right of dower, unless in cases of clear fraud.

THE opinion contains the facts.

Tuttle, for the complainant.

Williams, for the defendant.

By Court, ZABRISKIE, Chancellor. This suit is to compel the specific performance of a contract to convey a house and lot in Paterson.

The defendant on the 1st of August, 1856, leased the premises to the complainant for seven years and six months, at the yearly rent of three hundred dollars; this lease was under seal. By a written agreement, not sealed, but indorsed on the lease, and signed by both parties at the time of executing the lease, it was agreed "that at the expiration of the said term, Hawralty shall have the privilege of purchasing the whole of

said premises, paying therefor as purchase-money the sum of four thousand dollars." The complainant on January 19, 1864, offered the defendant to pay him the consideration money, without tendering it to him, and requested him to have the deed ready for him on the 1st of February. The premises at the date of the lease and contract were subject to three mortgages, previously given by the defendant and his wife, amounting to the sum of \$1,520 or thereabouts, and in the year 1861 another mortgage was given by them on the same to the complainant; all of which mortgages are unpaid.

The complainant alleges that he has been always ready, upon receiving a good title, free from encumbrances, to pay the purchase-money, or to receive it subject to the encumbrances, paying the excess of the purchase-money above the encumbrances; and prays that the defendant may be compelled to perform his contract, offering on his part to perform the same by paying four thousand dollars for a good marketable title free from encumbrances, or by paying the excess of said four thousand dollars above the encumbrances if the defendant shall be unable to remove them.

The defendant in his answer sets up that the contract is not under seal, and is without consideration, and without mutual obligation on part of the complainant; that it contains no legal covenant or agreement on his part to convey; that it was made by him under a misapprehension of its nature, and that he is unable to make a good marketable title, because his wife is unwilling to join in the conveyance.

The contract is not under seal, and is not mutual. The complainant is not under any obligation to purchase, either at law or in equity, and the defendant can have no remedy on it. These unilateral or optional contracts are not favored in equity, and it has been held, both in Great Britain and this country, that want of mutuality of obligation and remedy is a bar to specific performance: *Lawrenson v. Butler*, 1 Schoales & L. 13; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 282 [7 Am. Dec. 427]; *Benedict v. Lynch*, 1 Id. 370 [7 Am. Dec. 484]; *Smith v. McVeigh*, 11 N. J. Eq. 239.

But modern authorities have narrowed this doctrine down to cases in which there is no other consideration. And it is now well settled that an optional agreement to convey or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if it is made upon proper consideration, or

forms part of a lease or other contract between the parties that may be the true consideration for it: *Hatton v. Gray*, 2 Choice Cas. Ch. 164; *Backhouse v. Crosby*, 2 Eq. Cas. Abr. 32, par. 44; *Backhouse v. Mohun*, 3 Johns. 434; *Seton v. Slade*, 7 Ves. 265; *Fowle v. Freeman*, 9 Id. 351; *Western v. Russell*, 3 Ves. & B. 192; *Ormond v. Anderson*, 2 Ball & B. 370; *Clason v. Bailey*, 14 Johns. 484; *In re Hunter*, 1 Edw. Ch. 1; *Woodward v. Aspinwall*, 4 Sand. 272.

In this case, the agreement was executed at the same time with the lease, and was part of the same transaction, and must for this purpose be treated as if part of the lease.

In taking a lease, a tenant may be willing to pay a high rent for a number of years, provided the landlord will give him an optional right to purchase at a fixed price. And it is to be presumed that the landlord would not agree to such a boon unless he had a consideration in the lease. Any sufficient consideration would make such unilateral contract binding in equity.

The answer alleges that the contract was made under a mistake or misapprehension of its effect. A mistake on the part of the defendant as to a contract would be a defense here in a suit for specific performance, although it would not affect it at law, or be ground for setting it aside in equity: *Fry on Specific Performance*, sec. 478. But a mistake as to the legal effect of the agreement by the defendant will not relieve him, unless led into it by fraud, or the representations of the complainant: *Id.*, sec. 508; *Beaufort v. Neeld*, 12 Clark & F. 248.

The whole evidence of the mistake or misapprehension is in the testimony of the defendant himself. He understood the words of the contract, and supposed they bound him to convey. The scrivener employed by both parties told him it would not bind him. The testimony is not supported by any of the witnesses who were present, and it is very difficult to believe that the defendant supposed that a contract to sell, which complainant had for years been endeavoring to get signed by him, was when signed to have no binding effect. This defense is neither sufficient in law nor sufficiently proved to affect the written contract.

The objection that the agreement contains no covenant or agreement on the part of defendant to convey is literally true. The words are, the complainant "shall have the privilege of purchasing," and although not so comprehensive as a positive

agreement to convey, which is settled to mean, when not qualified by words or circumstances, to convey the fee, yet are sufficient in equity to entitle the complainant to a conveyance of all the estate of the defendant at the time of the contract. It is not necessary to settle here whether these words would be sufficient at law or in equity to compel the defendant to procure a good title or make compensation for encumbrances, as the inability of the defendant to procure the conveyance of the right of dower of his wife must be a bar to the decree of specific performance.

The complainant in his bill requires a marketable title, and offers to take that only; a title subject to the dower of a wife is not marketable.

The defendant in his answer says that he cannot give a marketable title, that his wife will not release her dower. This is responsive to the interrogatory in the bill, whether he cannot make a marketable title, and why, and must be taken as true; it is not contradicted or shown to be by procurement of the defendant.

This court will not order a defendant to procure a conveyance or release by his wife, or require him to furnish indemnity against her right of dower, unless in cases of clear fraud. The doctrine of indemnity in such cases is nowhere carried further than in *Young v. Paul*, 10 N. J. Eq. 401 [64 Am. Dec. 456]; and the opinions of the chancellor and court of appeals would exclude a case like this.

In case of a mere optional contract, it is much better to leave the party to his remedy at law.

The bill must be dismissed, with costs.

SPECIFIC PERFORMANCE WILL NOT BE DECREED when the remedy is not mutual, or one party only is bound by the agreement: *De Cordova v. Smith's Adm'rs*, 58 Am. Dec. 136, note 144; *Bodine v. Glading*, 59 Id. 749, note 751; *Ives v. Hazard*, 67 Id. 500; *Wynn v. Garland*, 68 Id. 190; *Rider v. Gray*, 69 Id. 135.

MISTAKE OF LAW UNATTENDED with misrepresentations, undue influence, misplaced confidence, or other special circumstances of similar character, is not ground for equitable relief against a contract: *Kenyon v. Welty*, 81 Am. Dec. 137, and note 140.

WHERE WIFE REFUSES TO JOIN HER HUSBAND in a conveyance of land which he has agreed to convey, and there is no fraud in the transaction, equity will not compel the husband to procure a conveyance or release of the dower interest of the wife, nor require him to furnish indemnity against her dower: *Primer v. Sharp*, 23 N. J. Eq. 282; *Reilly v. Smith*, 25 Id. 159; *Peeler v. Levy*, 26 Id. 335, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Scott v. Shiner*, 27 N. J. Eq. 187, where it is held that where a party agrees in writing to give another the refusal of purchase of land, and with the consent of the latter extends the refusal by written agreement to a third party, the agreements taken together constitute a binding obligation on the vendor to sell and convey the land in fee-simple to the third party for the price specified, if the offer was duly accepted, within the time limited.

ZABRISKIE v. HACKENSACK AND NEW YORK RAILROAD COMPANY.

[S C. E. GREEN, 178.]

CORPORATE CHARTER GRANTED BY LEGISLATURE is a contract between the state and the corporators, and the former cannot take away or impair any of the franchises or privileges granted. In other respects the corporation is subject to all general laws and police regulations made by the legislature after such grant, in the same manner as natural persons.

LEGISLATURE MAY CONFER NEW PRIVILEGES upon corporation, to be accepted at its election.

WHERE PARTIES ASSOCIATE THEMSELVES AS PARTNERS, or as a corporation, for a business and time specified in their agreement or charter, the objects and business of the partnership or corporation cannot be changed, abandoned, or sold out within the time specified without the consent of all the partners or corporators; one partner or corporator can prevent it, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter.

RESERVATION OF POWER IN STATUTE CREATING CORPORATION, that its charter may be altered, suspended, or repealed in the discretion of the legislature, is a reservation to the state for the benefit of the public, to be exercised by the state only, and does not extend to giving a power to one part of the corporators as against the others which they did not have before; nor can the legislature in the exercise of the power reserved authorize a bare majority of the corporators to change the object of the corporation in any manner.

RESERVED POWER OF LEGISLATURE TO REPEAL OR SUSPEND, alter or modify, a charter is confined to an alteration of something contained in the franchises granted; the legislature has no power to make any substantial additions to the work. It cannot impose a new charter and oblige the stockholders to accept it, nor can it substitute a thing entirely different from that granted.

SUPPLEMENTAL FRANCHISE GRANTED CORPORATION, authorizing it to construct additional work from that authorized by the original charter, but not compelling it to do so, is not an alteration or change of the original charter; it remains the same, and no new burdens are imposed except so far as the corporation assumes them. But the corporation is restrained from expending the money or using the credit of the shareholders in the additional enterprise unless every one of them consents.

STOCKHOLDERS CANNOT COMPLAIN OF CORPORATION where they all consent by acquiescence in the construction and maintenance of a new enterprise authorized by a supplemental charter, but not within the grant of the original charter.

THE opinion contains the facts.

Voorhis, for the complainant.

Knapp and Hopper, for the defendants.

By Court, GREEN, Chancellor. The Hackensack and New York Railroad Company was incorporated in 1856, with power to construct a railroad from Hackensack to the Paterson and Hudson River Railroad, with a capital stock of two hundred thousand dollars, and with power to mortgage its road and lands, franchises and appurtenances, to the amount of fifty thousand dollars. Under this act it laid out, located, and built a road five miles in length, terminating at Essex Street in Hackensack, within one mile of the court-house, as required by the charter. It borrowed thirty thousand dollars, for which it gave a mortgage upon the road and its equipment, franchises, and other property. By a supplement to this charter, passed March 12, 1861, it was authorized to extend the road northwardly to Nanent on the Erie railway, in the state of New York, a distance of about twelve miles, to increase the capital stock to any extent required, and to issue bonds to the amount of two hundred and fifty thousand dollars, which, in the words of the act, were "for the construction and equipment of the road to be constructed under this act; and to secure the payment of said bonds, the said company shall have power to mortgage the said road, with its franchises and chartered rights."

In 1861 the company extended its road under this supplement to a point on Passaic Street, in the village of Hackensack, more than a mile from the court-house, the length of the extension being about a mile. After this, it executed a new mortgage upon the whole road as extended, and its equipments, and its franchises and chartered rights, to secure the payment of ten thousand dollars. No new stock was issued for this extension.

The company has recently, under the supplement of 1861, laid out and located another extension for about a mile and a half north of the present terminus, reaching from Hackensack to New Bridge, and has made contracts for the construction of it, and has by resolution determined to make a new mortgage to cover the whole road, as it will be when finished to New Bridge, with its equipments and appurtenances, and the chartered rights and franchises of the company, to secure one hun-

dred bonds of one thousand dollars each, for the purpose of paying off the two mortgages which are now on the road; for relaying with new rails and ties the road first built, and furnishing it with the necessary equipment, which is now deficient for its business; and for constructing and equipping the extension to New Bridge.

The complainant is a stockholder in the company; and of 930 shares of capital stock issued for \$100 each, he owns 324. He applies for an injunction to restrain the defendants from constructing the extension to New Bridge, and from executing the mortgage proposed.

He opposes the extension on the ground that it is a different enterprise from that for which his stock was taken and the money paid, and that neither the directors nor a majority of the stockholders can compel him to embark his capital in any undertaking but the one for which it was subscribed and paid.

The extension to Nanent, authorized by the act of 1861, has never been submitted formally to the stockholders, nor has it in any way been approved of by them, or a majority of them, except by the assent given in the answer in this suit, to which the directors are made defendants, which is sworn by the directors individually, who own together 517 shares of the capital stock. But of this, two hundred shares held by one of them, Mr. Robert Rennie, is special stock issued to him to build the Lodi Branch, which is leased to him during the existence of the company, and which he is to operate at his own expense and for his own profit, under an agreement that he shall pay as rent the dividends that may be declared on these two hundred shares; and under another agreement, indorsed on the certificate of stock issued for these shares, that they are to be entitled to no dividends beyond the rent of the Lodi Branch; or in other words, that he is to pay no rent, and this stock is to receive no dividends. Under these circumstances, this stock can receive no benefit from the extension if it is profitable, nor sustain any loss from it if it is ruinous. And it would seem that if the consent of a majority of the shareholders was necessary to the new enterprise of the extension, the assent of the other 317 shares held by the directors, not being a majority of the whole stock held by the complainant, who dissents, is not the consent of the majority of the stockholders. And if it is necessary to obtain the consent of a majority to make the extension authorized by the sup-

plement of 1861, that consent does not appear in the cause as now presented.

The extension authorized by the act of 1861 is a radical change in the object of this corporation; it is an enterprise entirely different from that in the charter. That was to construct and operate a railroad from Hackensack to the Paterson railroad at Boiling Spring, an easy and almost direct route to New York; it was from a thriving village, the county town of Bergen County, over a level country, and only five miles in length, as shown by the return of its location. The extension would be about twelve miles in length, through an uneven country, mostly if not wholly agricultural; with no village, except the very small one at New Bridge, on its route; and it runs into the state of New York some distance, and terminates at a point on that part of the Erie railway which the company have abandoned for regular traffic, and on which few trains are run. It is an entirely different enterprise.

The question here is, Can this company, either with or without the consent of a majority in interest of its stockholders, compel the complainant to embark capital subscribed for the first enterprise in this new one, entirely different.

Since the Dartmouth College case, in the supreme court of the United States, the doctrine has been considered firmly established, and been confirmed by repeated decisions, both in that court and the state courts, that a charter granted by the legislature to a corporation is a contract between the state and the corporators, and that the state can pass no act to take away or impair any of the franchises or privileges granted by it. The company, or artificial person, thus created, and its property, is subject to all general laws and police regulations made by the legislature after such grant, in the same manner as natural persons and their property are; provided they are not such as to take away or impair any of the franchises plainly granted by the charter. This doctrine did not prevent the legislature from conferring new privileges upon any corporation, to be accepted at its own election.

It is also settled, upon the principles of the common law, in this state, and most of the states of the Union, that when a number of persons associate themselves as partners for a business and time specified in the agreement between them, or become members of a corporation for definite purposes and objects specified in their charter, which in such case is their contract, and for a time settled by it, the objects and

business of the partnership or corporation cannot be changed or abandoned or sold out within the time specified without the consent of all the partners or corporators; one partner or corporator, however small his interest, can prevent it. And this is so although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter.

This rule is founded on principle,—the great principle of protecting every man and his property by contracts entered into, a guiding principle in all right legislation, and incorporated into the constitution of the United States, and of almost every state in the Union. And the rule is not changed because the new business or enterprise proposed is allowed by law, or has been made lawful since the association was formed.

The leading case on this subject is that of *Natusch v. Irving*, decided by Lord Eldon in 1824. It is not contained in the regular reports, but may be found in the appendix to Gow on Partnership, 3d ed., 576, or in Lindley on Partnership, 511. There a partnership was formed for life insurance, and after it was entered into, an act of Parliament made it lawful for such a firm to enter upon the business of marine insurance, which was prohibited to them before. A majority of the partners determined to embark in the business of marine insurance, thus made lawful. Lord Eldon held them barred by the contract of copartnership, unless every partner agreed to alter it. In England, the same doctrine is applied to corporations rigidly, and is acknowledged in all cases on the subject. And although, from the omnipotent power of Parliament, restrained by no written constitution, they hold that the contract can be changed by act of Parliament, yet the English court of chancery will enjoin the directors or the corporation, on application of a single stockholder, from using the common funds, to apply to Parliament for a change.

The doctrine of *Natusch v. Irving* was adopted in New York by Chancellor Kent in the case of *Livingston v. Lynch*, 4 Johns. Ch. 573, and in this state by the decision of Parker, master, sitting to advise the chancellor, in *Kean v. Johnson*, 10 N. J. Eq. 401, and has been recognized and adopted in almost all the states of the Union.

The opinion of Chancellor Bennet in *Stevens v. Rutland and Burlington R. R. Co.*, 29 Vt. 548 (also found in 1 Am. Law Reg.

154), contains a very able exposition and application of it. It will also be found in Angell and Ames on Corporations, secs. 391-393, 536-539; Lindley on Partnership, 515; Pierce on Railroads, 78; *Hartford & N. H. R. R. Co. v. Croswell*, 5 Hill, 383 [40 Am. Dec. 354]; *Troy and Rutland R. R. Co. v. Kerr*, 17 Barb. 581; *Macedon Plank Road Co. v. Lapham*, 13 Id. 312; *Buffalo, Corning, & N. Y. R. R. Co. v. Pottle*, 23 Id. 21; *Banet v. Alton and Sangamon R. R. Co.*, 13 Ill. 504; *Graham v. Birkenhead R. R. Co.*, 2 Macn. & G. 156.

After the effect of the rule established in the Dartmouth College case began to be felt in the states, it was found that by the numerous acts of incorporation freely, and perhaps necessarily, granted, great inconveniences resulted, and that provisions incautiously inserted too much restricted the power of future legislatures; and that the laws which experience showed were necessary to govern corporations in the exercise of their powers could not be passed. And the legislature of many states, by degrees and successively, adopted the practice of inserting in acts granting franchises that they might alter, modify, or repeal the act; and also by general law provided that all acts of incorporation thereafter passed should be subject to such alteration and repeal.

The provision is contained in the general act of this state, passed in 1846 (Nixon's Digest, p. 152, sec. 6), that such charters should be subject to alteration, suspension, and repeal in the discretion of the legislature. This and all similar special and general provisions were intended for the purpose specified,—to give to the legislature the clear right at their pleasure to alter or repeal the acts of incorporation. The state without this could have done it with the assent of the corporators. They could give them property, they could add to their powers or privileges; but they could not take away any power, privilege, or franchise conferred by the act, nor compel them to exercise any new power or franchise conferred.

Besides this general law of the state, the charter of the defendants contains this provision, that "the legislature may at any time alter, modify, or repeal the same."

The object and purpose of these provisions are so plain, and so plainly expressed in the words, that it seems strange that any doubt could be raised concerning it. It was a reservation to the state for the benefit of the public, to be exercised by the state only. The state was making what had been decided to be a contract, and it reserved the power of change by alter-

ing, modifying, or repealing the contract. Neither the words nor the circumstances nor apparent objects for which this provision was made can by any fair construction extend it to giving a power to one part of the corporators as against the other which they did not have before.

It was to avoid the rule in the Dartmouth College case, not that in *Natusch v. Irving*, that the change was made. The words limit the power to that object.

On general principles and the settled rules of construction, I would hold this to be the effect, and only effect, of the provision in the general act and in the charter of the defendants, without any hesitation, were it not for a series of decisions by most respectable courts which hold that this provision obviates the effect of the rule in *Natusch v. Irving* and *Kean v. Johnson*, *supra*, and enables a majority of the corporators in all charters subject to a like provision to change, by legislative permission and within certain limits, the object and purpose of the corporation. They hold that the contract between associate corporators that they will confine their business to life insurance is changed by legislative permission to engage in marine insurance, or a contract to join in constructing a railroad from New York to Newark can be changed to one from New York to Elizabeth, by legislative consent. The reasoning is founded on the fact that the subscription for the stock, which is the contract, was made, as in this case, under a charter which authorizes a road from the Paterson road to Hackensack, and authorizes the legislature to alter and modify the act. And from this they infer that it is a contract to join in building any road that the legislature may by such alteration authorize the company to build, and that such authority or additional privilege may be accepted by a majority of the corporators.

So far as the alteration is made by the legislature in a way to be compulsory on the corporation, this is correct; as if they should require the company to build a double track, or widen the draws in a bridge, or exact less fare or toll; these would be within the contract, or would be annexed to it as a condition, and every stockholder would take his stock subject to the contingency of such alteration.

But if the change in the act is simply offering the corporation the privilege of entering upon another and a different enterprise, it is not within the condition to the subscription. The only construction to be given is, that the legislature may alter, not that the stockholders may as between each other.

The case of *Natusch v. Irving* was decided upon this very ground. The act of Parliament had given the company the power to embark in marine insurance, but the consent of all the parties was still held necessary. The plain object of the reservation in this case was to give the legislature, not a bare majority of the stockholders, power.

This view of the case is so clear upon principle that I feel constrained to be guided by it, although the weight of the decisions in other states is against it.

In Maine the decisions of the supreme court are in accordance with it. In the case of *Meadow Dam Co. v. Gray*, 30 Me. 547, the company was incorporated to build a dam across navigable waters. Under the power reserved to alter and repeal, an act was passed requiring it to make in the dam a lock for the benefit of public navigation. This was not increasing the powers or changing the enterprise of the corporation, but requiring in the work authorized an accommodation for the public omitted in the original act. What the change was is not mentioned in the report, but it is stated in *Oldtown and Lincoln R. R. Co. v. Veasie*, 39 Me. 571, by Chief Justice Shepley, who delivered the opinion in both cases.

In the case of *Oldtown and Lincoln R. R. Co. v. Veasie*, *supra*, the act of incorporation, passed March 8, 1852, authorized not less than eleven thousand nor more than fifteen thousand shares. Veasie, August 13, 1852, subscribed for one thousand shares; only nine thousand five hundred shares were subscribed. A supplement, passed September, 1853, under the power reserved to alter, fixed the capital at not less than eight thousand nor more than twenty-five thousand shares. This was accepted by the directors. Veasie was sued for his subscription, and objected on the ground that until the supplement was passed, the number of shares required to constitute the company not having been subscribed, he could not be sued for his subscription, and that the legislature, under the power reserved, although they might alter the charter, could not affect the rights of the stockholders between themselves, or change their contract with the company.

The court held that he was not liable under the original act to be sued until eleven thousand shares were subscribed for, and that the power to amend did not authorize a change in the rights or liabilities of the incorporators between themselves.

Chief Justice Shepley says (p. 580): "The legislature might as well have attempted to alter a contract between the

corporation and one of its members respecting the construction of the road as a contract respecting any part of its capital. If a corporation, being party to a contract with one of its corporators, might by the assistance of the legislature absolve itself from the performance of any part of the contract, it might from the whole, and might require payment of the money subscribed without allowing the subscriber to derive any benefit from it. It is the charter only, and the rights and liabilities of the corporators as such in consequence thereof, that can be varied by an act of the legislature, and not the private contracts made between the corporation as one party, and its corporators as the other."

Now, in this case, the private contract between the stockholders and the corporation, or between them mutually, on subscribing for the stock, was that their enterprise was the road from the Paterson railroad to Hackensack, and the power reserved was not to authorize any of the parties to this private contract at their pleasure to violate it. The supplement of 1861 does not require the extension to be built; it only authorizes it at the option of the corporation. The words are, "it shall be lawful for said company to extend their railroad." And it is held in England, where the courts by *mandamus* compel a company to construct the road it is incorporated to construct, that an act giving the privilege of extension is not obligatory on the company, and the *mandamus* is in such case refused: *York and Midland R. R. Co. v. Regina*, 1 El. & B. 858; in which the exchequer chamber reversed the decision of the common bench, in 1 Id. 178, in the same case.

In New York a different rule has been established, and it is held that the power to alter will authorize the company, by consent of the legislature, to extend its enterprise without the consent of the stockholders. The rule was first adopted to enable companies to subscribe to the stock or bonds of other enterprises that brought business to them, and then was extended to cases where they were authorized to build extensions or branches to their own works: *North R. R. Co. v. Miller*, 10 Barb. 280; *White v. Syracuse and Utica R. R. Co.*, 14 Id. 560; *Schenectady etc. Plank R. Co. v. Thatcher*, 11 N. Y. 102; *Buffalo and New York City R. R. Co. v. Dudley*, 14 Id. 336. The reasoning of the judges in these cases does not satisfy me. The courts which decided the first cases would not have adopted the principles which guided them if they

had been asked to apply it to a case like this, or like the later cases in New York.

In *White v. Syracuse etc. R. R. Co.*, 14 Barb. 570, Judge Edwards, in delivering the opinion of the court, says that under this reservation the legislature cannot create a new company with a new and distinct business, but that in the case before them the company would remain the same as to its character, structure, objects, and business. It would have the same road, the same buildings and property, with the same agents, as it would have if the law had not been passed. But the principle of power to let a majority alter is the same whether the alteration be great or small, and courts can exercise no discretion as to the extent of change which the company by permission of the legislature may adopt.

In the case of *Schenectady etc. Plank R. Co. v. Thatcher*, 11 N. Y. 109, the court put their decision on the ground that the change was unimportant, and would not injure the defendant; and seem by their reasoning to admit that if the change had been as great as in the case of *Hartford and New Haven R. R. Co. v. Croswell*, 5 Hill, 383 [40 Am. Dec. 354], they would have decided differently.

In *Buffalo and New York City R. R. Co. v. Dudley*, 14 N. Y. 355, Selden, J., in delivering the opinion of the court, places the decision on the ground that it was ruled in the case just quoted "that no mere addition to or alteration of the charter, however great, could operate to discharge a stockholder from his obligation to the corporation"; and he questions the soundness of the decisions in *Hartford and New Haven R. R. Co. v. Croswell*, *supra*. These decisions are not sufficiently consistent, or so based upon the principles that should govern this case, as to influence me to depart from the conclusions arrived at.

The supreme court of Massachusetts has followed the decisions in New York, and in the well-considered and well-argued case of *Durfee v. Old Colony R. Co.*, 5 Allen, 230, arrived at the conclusion that the reserved right to alter and repeal authorized a company to engage in a new enterprise without the consent of all the shareholders. The reasoning of the able counsel who combated this position contains the best exposition of the law that I have found anywhere. The reasoning of Chief Justice Bigelow in delivering the opinion of the court does not convince me. He places the decision upon principles not acknowledged in this state, and relies upon the two cases in Maine, cited above, as well as those in

New York, as supporting his view. He assumes (on page 244) that it is the object of the provision that an amendment may be made by the consent of both parties, the legislature on the one side, and the corporation on the other; the former expressing its assent by a legislative act, and the latter by a vote of the majority of stockholders; and observes "that it is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the consent of the other contracting party."

Now, in this state it is settled that an alteration made by the legislature under this reserved power is valid and binding without the consent and against the will of the corporation and all its members. The two decisions in the court of errors, not yet reported, upon the charters of the Morris and Essex Railroad Company, and of the Jersey City and Bergen Railroad Company, settle that the legislature may, against the will of the companies, change the mode of taxation prescribed in their charter for one more burdensome.

And the rule of the common law as to contracts adopted here gives the power to the parties, where both assent, to alter any contract without the stipulation for that purpose, which would seem from the language of the opinion to be ordinarily inserted for it in Massachusetts. Such stipulation is seldom or never made in New Jersey.

This view, that the object of the reserved power was to give the majority of the corporators the power to control the minority with the consent of the legislature, has never been adopted in this state. The act of Massachusetts (Stats. 1831, c. 81) to which reference is made contains no provision as to consent of the stockholders, but is a pure, simple reservation of power, like the act of New Jersey.

The decisions in the cases of *Banet v. Alton & Sang. R. R. Co.*, 13 Ill. 504, *Pacific R. R. v. Renshaw*, 18 Mo. 210, and *Pacific R. R. v. Hughes*, 22 Id. 291 [64 Am. Dec. 265], hold that the majority of the stockholders, by authority of the legislature, may make a change, provided it is not great or a radical one. They in express terms say that a change like this would not be warranted, and so far as of authority are on the side of the complainant.

But the principle on which they are decided is wrong; and if it is once conceded that a majority of the corporators may by authority from the legislature change the object of the enterprise in small things, there is no principle of law by

which they can be restrained in any a little larger, or in the character of the whole work. The same principle will lead the courts of Illinois and Missouri, as it did those in New York, to allow radical changes, and must, if consistently applied, allow a charter for a railroad to be used for banking or insurance business, or for a canal, theater, brewery, or beer-saloon.

There is no other alternative to the proposition that while the power reserved authorizes the legislature within certain limits to make such alterations as they choose to impose, it gives no authority when the legislature does not impose them for the majority to adopt such alterations or enter upon such enterprises as are allowed by the legislature.

Again, the power of the legislature has its limits. It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion-house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind wholly or chiefly new substituted for another is not an alteration: it is a change.

In some cases there might be room for doubts, but in this case there can be no hesitation in saying that a railroad of seventeen miles from the Paterson road to Nanent is a change and substitution of one work for another, and not an alteration of the road to Hackensack. They are substantially two different enterprises.

Again, the power is to alter or modify the act, and the true construction of this I hold to be an alteration of something contained in or granted by the act. Any of the franchises granted may be altered; the right to take land by condemnation, the right to take tolls or fare, or the amount to be taken. But the legislature had no right to impose upon the company any other duty, or anything involving any other duty, than that attending the building a railroad from the Paterson road to Hackensack; anything in the manner of doing that they had a right to change. They could not oblige it to dam and

drain all the meadows along the Hackensack, or to construct a canal, or to build a road from Hoboken to Newark, nor could they oblige it to extend its road to Nanent. They could as well oblige it to run to the Pacific. We must keep in mind that by the decisions in New Jersey the company need not accept the alterations; they are bound by them without acceptance if within the power reserved.

By a wider construction of this power, any of the main lines of railroad running through the state, incorporated since 1846, or by an act which has in it the power of alteration, may be compelled to build and run a branch to any village or place near that route that the legislature may direct. It must be held that the power to alter and modify does not give power to make any substantial additions to the work.

Again, the act of 1861 does not in fact alter or modify the act of 1856 in any one thing embraced in it. That act, and every power and franchise granted by it, and any duty it imposed, remains the same. And the defendants can now go on under it precisely as if the supplement had not been passed. The company is authorized to construct another road; it is not compelled to do it. If it builds it, or if it does not, its old charter remains with all its franchises and privileges intact, and no new burdens imposed except so far as it assumes them. This is in no sense of the word an alteration of the charter. It would be as absurd to say that an owner had altered his house who had built a larger one on an adjoining lot. And until the legislature have made a valid alteration of the charter, the rights of each stockholder are as held in *Kean v. Johnson*, 10 N. J. Eq. 401,—he can prevent all the others from changing or abandoning the work.

The supplement of 1861 is a perfectly valid and constitutional act. It is a grant of privileges that the legislature have a right to grant, as they could grant to this corporation the right to conduct banking or insurance business, or to run a ferry across the North River; but the company is restrained by the law of corporations and partnerships from expending the money or using the credit of the corporation in such enterprises unless every share-holder consents.

The extension to Passaic Street, both because it comes within the grant in the charter, and more especially because every share-holder must be held to have consented to it by acquiescing in its construction and maintenance for years, must be decided to be lawful.

The defendants must be restrained from extending the road beyond its present terminus at Passaic Street, and from expending any money of the company to pay for any such extension, or from giving any mortgage for the cost of such extension.

There is no foundation for an injunction against a mortgage for any lawful object on either part of the road. There is great doubt whether a mortgage on either of the two parts of the road heretofore constructed for the cost of the other would pass the franchises of the company in such mortgaged part, but it would be valid as to the property other than franchises, which the company can mortgage without any special power. And besides, the bonds of the company, or its lawful contracts, would entitle the holder to recover upon them, and under the judgment, by the act of 1858 (Nixon's Digest, 719), the whole road and franchises could be sold. The complainant, therefore, cannot be injured by a mortgage, whether valid or not, upon any part of the road.

CHARTER GRANTED CORPORATION IN CONTRACT with the state, the obligations of which cannot be impaired by subsequent legislation. But the corporation is subject to remedial legislation, and is amenable to general laws: *Coffin v. Rich*, 79 Am. Dec. 559, and note 566; *State v. Miller*, 86 Id. 183, and note 193.

CORPORATION CAN EXERCISE ONLY POWERS EXPRESSLY GRANTED, and those arising by necessary implication: *Commonwealth v. Eris etc. R. R. Co.*, 67 Am. Dec. 471, and note 485.

POWER OF LEGISLATURE TO REPEAL OR ALTER corporate charter under a right reserved by statute: *Story v. Jersey City etc. Road Co.*, 84 Am. Dec. 134, and note 141; *Crease v. Babcock*, 34 Id. 61.

POWER OF LEGISLATURE TO AUTHORIZE MAJORITY of stockholders to change the object for which a corporation was created: *Story v. Jersey City etc. Road Co.*, 84 Am. Dec. 134, and note 141.

STATUTE GRANTING ADDITIONAL POWERS TO CORPORATION, effect of on acts done under the old charter: *Johnston v. Crawley*, 71 Am. Dec. 173.

ALTERED CHARTER OF CORPORATION, rights of dissenting stockholder under: *Martin v. Pensacola etc. R. R. Co.*, 73 Am. Dec. 713, and note 722; as to the remedy for a stockholder under an altered charter, see Id., and *Pacific R. v. Hughes*, 64 Id. 265, and note.

WHERE PARTIES ENTER INTO PARTNERSHIP OR BECOME INCORPORATED for a specified object or purpose, and the articles of partnership or corporate charter specify that the business is to be continued for a designated time, it cannot be abandoned, changed, or sold out except with the consent of all of the stockholders; one of them can prevent it, and a majority cannot effect it: *Black v. Delaware etc. Canal Co.*, 23 N. J. Eq. 404, 416; S. C., 24 Id. 464, 466, both citing the principal case.

POWER OF LEGISLATURE RESERVED IN CORPORATE CHARTER to repeal or alter it cannot be exercised to take away or destroy rights acquired by virtue of such charter; nor will the reservation empower the legislature to change the object or control of the corporation, or create a new use inconsistent with the intent and purpose of the old charter: *Miller v. State*, 15 Wall. 498. So the legislature cannot legalize the extension of an enterprise against the dissent of any stockholder beyond the bounds designated in the charter: *New Jersey etc. R. R. Co. v. Stratt*, 35 N. J. L. 325; *Mills v. Central R. R. Co.*, 41 N. J. Eq. 8, all citing the principal case, and the latter citing it to both of the above points.

CORPORATION HAS NO RIGHT TO ENTER INTO NEW ENTERPRISE not authorized by its charter. The right to enlarge the franchise is within the control of the legislature, and if the corporation is afterwards empowered to enter into the new undertaking, it is doubtful whether, without the consent or acquiescence of all of the stockholders, such power could be exercised: *Morris etc. R. R. Co. v. Sussex R. R. Co.*, 20 N. J. Eq. 564, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Monday v. Railway*, 43 N. J. L. 341, in support of the proposition that under the constitution of New Jersey the legislature is forbidden to pass any law depriving a person of a remedy for enforcing a contract existing when the contract was made, and that such prohibition applies to remedies against municipal corporations.

WHEREAS OFFICERS OF CORPORATION have agreed to perform an act which is strictly *ultra vires*, such act may be enjoined at the suit of a single stockholder: *Elkins v. Camden etc. R. R. Co.*, 36 N. J. Eq. 15, citing the principal case.

LEWIS v. SCHENCK AND SMITH.

[S C. E. GREEN, 450.]

MATERIAL ALTERATION OF NOTE BY PAYEE unauthorized in any way by the maker, but made without any fraudulent intent, and under mistake, avoids the note, but leaves the debt unpaid, and the payee may recover it.

MATERIAL ALTERATION OF NOTE BY PAYEE, without fraudulent intent and under mistake, avoids the note, but leaves the debt unpaid, and the proper remedy to recover it is at law; but where the discovery prayed by the bill is in some degree necessary to show the agreement and the mistake, equity will entertain jurisdiction.

THE opinion contains the facts.

Linn, for the complainant.

Voorhees, for the defendants.

By Court, GREEN, Chancellor. On the seventh day of February, 1863, Henry A. Herder, sheriff of Somerset, sold a farm of the defendant Schenck by virtue of several executions in his hands; one of these was in favor of the complainant, Lewis, and there was due on it \$551.64, besides costs. Before

the sale, Schenck represented to Vanderbeck, the agent of Lewis, who was not present, but at his home in Ohio, that the defendant Smith would buy in the farm for him, and requested Vanderbeck to give him eight months' time to pay Lewis's claim, for which he and Smith would be responsible. Vanderbeck agreed to this, and Schenck and Smith agreed with Vanderbeck that they would pay Lewis his claim in eight months, and give their note, payable at bank, for the amount. The property was sold by the sheriff to Smith for \$11,051, being the full amount of the claims in the sheriff's hands, including all costs and expenses. After the sale, on the same day, Schenck and Smith made their joint and several note to Lewis for \$551.64, payable to him or bearer at eight months from date, and gave it to Vanderbeck, who thereupon gave the sheriff a receipt for the execution debt of Lewis. The sheriff afterwards delivered the deed to Smith, without any further payment of the judgment of Lewis; this note, or rather Vanderbeck's receipt, being taken by him as payment of that claim. Vanderbeck, on the day of the sale, after Schenck and Smith had left, had some conversation with the sheriff about the note, and the fact that it did not include interest for the eight months, which both supposed it ought to have included. He supposed that such was the understanding, and that the omission was a mistake which he had a right to correct, and he altered the note in the presence of the sheriff, by adding the words "with interest from date." Lewis did not know of the alteration until after the note became due. When it became due, Schenck and Smith refused to pay it on account of the alteration. They both testify that the agreement or understanding was not to pay interest, but only to pay the money at the end of eight months; and they refused to pay any part of the note, contending that the alteration of the note made it void, and that the complainant had no remedy against them.

The complainant relinquished his suit at law against them, and filed his bill in this court to compel the payment of the amount due on his execution, which the defendants had promised to pay.

The complainant gave a receipt to the sheriff, and authorized him to deliver the deed without further payment of his claim, upon the promise of the defendants, and their note given as evidence of it, to pay the claim in eight months. It was a bargain made by them with him, and not with the

sheriff; it was a bargain made upon a good and valid consideration. The mere verbal promise was good; it was to pay a debt of their own, not that of another, and not within the statute of frauds. The note was given to secure the money they had so promised to pay. The consideration was, that the sheriff conveyed to Smith, for the use of Schenck, the interest which Lewis had in this farm by the lien of his judgment.

The alteration of the note by Vanderbeck was of a material part, and not authorized by the makers, either directly or by implication, from the fact that it was intended to be given with interest. The proof shows that it was not so intended. But Vanderbeck, thinking that such was the intention, supposed he had power to correct it, and made the alteration for that purpose. He made the alteration without any fraudulent intent, but under a mistake of the facts.

In such case, although the alteration avoids the note, yet it leaves the original debt unpaid: 2 Parsons on Notes and Bills, 671, 572; *Clute v. Small*, 17 Wend. 238.

A note of the party himself is not payment of his debt. Here the defendants owed the complainant this money upon their undertaking to pay it, and it was not paid by the giving of the note. Had the complainant willfully or fraudulently destroyed the note, he could not have recovered the debt for which it was given; but if destroyed by the mistake of himself or agent, it would not defeat him in recovering his original debt.

The only doubt in the case arises upon the jurisdiction of this court. The complainant might have recovered his debt at law upon the view taken of the matter. But the act of Vanderbeck, which avoided the instrument, was done under misapprehension; and courts of equity have jurisdiction in all cases of mistake, and the discovery prayed by the bill was in some degree necessary to show the agreement and the mistake, and therefore the jurisdiction of this court may be sustained.

I am of opinion that the complainant is entitled to the relief sought, and that the defendants should be compelled to pay him the sum of \$551.64, with interest from October 10, 1863, the time when they agreed to pay that sum to him.

Trigg v. Taylor, 72 Id. 263; *Brownell v. Winnie*, 86 Id. 314, and notes to these cases.

ALTERATION OF NOTE BY PAYEE without the maker's knowledge, but without any fraudulent intent, and to correct a mistake, does not avoid it in the hands of an indorsee: *Ames v. Colburn*, 71 Am. Dec. 723. So a material alteration of mortgage notes does not destroy the debt and mortgage if the alteration is not fraudulent: *Vogle v. Ripper*, 85 Id. 298, and note 301.

THE PRINCIPAL CASE IS CITED in *Hunt v. Gray*, 35 N. J. L. 234, to the point that an alteration of a note by the payee, though it avoids the note, leaves the original debt unpaid; and if the alteration was made without any fraudulent intent, but under a mistake of facts, the debt may be recovered.

TIDE-WATER COMPANY v. COSTER.

[S C. E. GREEN, 61A.]

PREROGATIVES OF TAXATION AND OF EMINENT DOMAIN may be resorted to by the legislature for the purpose of reclaiming a vast tract of land and making it fit for habitation and use.

WHETHER ENTERPRISE OR SCHEME OF IMPROVEMENT is of such public utility as to justify a resort for its furtherance to the exercise of the power of taxation or eminent domain is for the legislature to decide. Primarily the judiciary has no concern in such matter.

CONTRACT FOR IMPROVEMENT OF LAND authorized by the legislature is illegal and void, unless all of the land-owners assent, if the compensation for the work contracted for is made to turn in any degree whatever on the future value of the land, and which by any possibility could be in evident excess of the real cost of the improvement.

IN PROCEEDINGS TO EFFECT PUBLIC IMPROVEMENT, the assessment of expenses on the property to be improved must not exceed the value of the benefit conferred upon the land-owner; and in case the expense of improvement does exceed the benefits conferred, indemnification to the owner of the land subjected to the operation of the law must be made for the excess, or the law is void.

COST OF PUBLIC IMPROVEMENT OF LAND under legislative action may, to a certain degree, be imposed upon the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage. But the benefit must be commensurate to the burden, and in the event of an excess of expenses imposed over benefits received, private property is *pro tanto* taken for public use without compensation.

THE opinion states the facts.

Williamson and P. D. Vroom, for the appellants.

Vanatta and McCarter, for the respondents.

By Court, BEASLEY, C. J. The appellant, the Tide-water Company, is a corporation created by an act of the legislature passed April 4, 1866. The purpose for which this company was called into existence was to assist in draining the tide-water marshes adjoining Newark Bay and its tributary streams.

The means by which this useful end was to be attained were, in the statutory language, "the construction, maintenance, and management of suitable dikes, drains, ditches, dams, sluices, engines, pumps, and all other machinery, works, and structures necessary or useful in the improvements required to fit said lands for occupancy and use, and for the maintenance of the drainage thereof." And with the view of providing these means, the corporation in question was formed, with a capital stock of one million dollars. In addition to the organization of this incorporated body, the act authorizes the appointment by a justice of the supreme court of three commissioners, who are empowered to enter into a contract with the Tide-water Company for the performance of the work above specified; it being required, however, that before such contract should go into effect, it should be confirmed by a judge of the supreme or circuit court. The direction for the raising and payment of this contract price is contained in the following clause: "That said commissioners, after making the contract provided for in the next preceding section of this act, and after the reclaiming of said lands or any part thereof shall have been completed according to said contract, shall assess upon the said lands so reclaimed a just proportion of the contract price, and of the expenses of said commission, and shall cause the same to be collected annually, and shall pay the stipulated compensation to said company." These assessments are also made liens upon the lands respectively, and a sale is authorized in case of non-payment.

These are the general aspects of this statute, and for the purposes of this opinion it is not necessary to dwell on details.

Commissioners having been appointed, the Tide-water Company presented the outline of a contract to them for their consideration; and at this stage of the proceedings further action was arrested by an injunction issued out of the court of chancery, founded on a bill filed by the respondents in this court, who are the owners of certain of the meadows to be affected by the act. A motion to discharge the injunction for want of merits in this bill, having failed before the chancellor, has given occasion for this appeal.

The injunction in the court below was issued and sustained upon the ground that the act of the legislature to which reference has just been made was unconstitutional. It is not now pretended that the judicial suspension of these proceedings is to be justified from any other consideration. The only ques-

tion, therefore, to be resolved at the present time by this court is as to the power of the legislature to enact the law which forms the basis of this controversy.

That the legislative authority is competent to effect the end provided for in this act, I can entertain no doubt. The purpose contemplated is to reclaim and bring into use a tract of land covering about one fourth of the county of Hudson and several thousand acres in the county of Union. This large district is now comparatively useless. In its present condition it impairs very materially the benefits which naturally belong to the adjacency of the territory of the state to its navigable waters. It is difficult, from the great expense of such works, to build roads across it, and consequently it has heretofore interposed a barrier to anything like easy access, except by means of railroads, from one town to another situated upon its borders. To remove these evils, and to make this vast region fit for habitation and use, seems to me plainly within the legitimate province of legislation; and to effect such ends, I see no reason to doubt that both the prerogatives of taxation and of eminent domain may be resorted to. From the earliest times, the history of the legislation of this state exhibits many examples of the exercise of both these powers for purposes not dissimilar, and by these means, without question, many improvements have been effected. The principle is similar to that which validates the transfer by legislative authority of private property to private corporations for the construction of railroads and canals, or the construction of sewers and streets, and the imposition of the expense on the lands benefited. It is the resulting general utility which gives such enterprises a kind of public aspect, and invests them with privileges which do not belong to mere private interests. I have no difficulty, therefore, in concluding that the legislature was fully authorized to adopt measures to accomplish the general design embraced in this act now under the consideration of this court.

Nor, in this connection, should it fail to be observed that it is one of the legislative prerogatives to decide the important question whether an enterprise or scheme of improvement be of such public utility as to justify a resort for its furtherance to the exercise of the power of taxation or eminent domain. Primarily, the judiciary has no concern in such matter. And not only this, but if the public interest be involved to any substantial extent, and if the project contemplated can in any fair

sense be said to be promotive of the welfare or convenience of the community, the legislative adoption of such project is a determination of the question, from which there is no appeal, and over which no other branch of the government has any supervision whatever. Whether a road, a turnpike, a bridge, or a canal will subserve public or private needs are inquiries addressed exclusively to the law-making power, whose answer, according to the genius of our government, must be final and irreversible. This doctrine has been often propounded as the undoubted rule of law by the most eminent elementary writers, and has received the sanction of much judicial adoption. "It undoubtedly must rest," says Chancellor Kent, "as a general rule, in the wisdom of the legislature to determine when public uses require the assumption of private property": 2 Kent's Com. 340. In *Cottrill v. Myrick*, 12 Me. 222, it is remarked: "It rests with the legislature to judge of the cases which require the operation of the right of eminent domain, and it may be applied in cases of roads, turnpikes, railways, canals, ferries, bridges, etc., provided there be in the assumption of the property evident utility and reasonable accommodation as respects the public." And in *Beekman v. Saratoga and Schenectady R. R. Co.*, 3 Paige, 73 [22 Am. Dec. 679], equally explicit upon this subject is the language of Chancellor Walworth. "But if the public interest [such are the words of this enlightened jurist] can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose. It is upon this principle that the legislatures of several of the states have authorized the condemnation of the lands of individuals for mill-sites, where, from the nature of the country, such mill-sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. Upon the same principle of public benefit, not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals, of erecting and constructing wharves and basins, of establishing ferries, of draining swamps and marshes, and of bringing water to cities and villages."

These citations embody, in my opinion, the correct and es-

established principle, and at the same time illustrate the nature and define the extent of such principle. The legislative power is not competent to take the property of A and transfer it to B simply for the benefit or convenience of B, because such an act has no public aspect; it concerns and affects exclusively the two individuals. In such case, it would be within the authority of the judiciary to pronounce such transfer unconstitutional and void. But if the sequestration of the property of A will to a material extent be serviceable to the public at large, whether such sequestration shall take place must be committed as a pure matter of discretion to the legislature, provided such discretion be exercised in good faith, and does not rest incontrovertibly upon a false foundation. Applying this rule to the facts of the present case, it seems to me that no person can deny that the decision which the legislature has made, to the effect that the project provided for in the act at present considered is an authorized act of legislative authority, has in it elements of public utility, and that consequently this court has not the power to review such decision. A statute authorizing the erection of a dike at the public charge, for the purpose of protecting large sections of land within the state from the overflow of freshets or the reflux of the tide, would be universally acknowledged to be clearly within the bounds of legitimate legislation, and yet it is conceived the purpose of the present law is not in its general character dissimilar from such a public work. The object proposed, and for which provision is made in the statute under review, being, then, one tending to the benefit of the community at large, must be regarded, upon principles which are too valuable to social interests to be disturbed, as coming exclusively under legislative control. The objection raised on this foundation in the argument consequently is not solid.

Nor have I been able to perceive much force in many of the topics of objection embraced in the arguments of counsel. One of the principal reasons urged why this act could not be enforced was that it authorized the commissioners to pay to the company more than the expense of constructing the works and performing the labor incident to the enterprise. It was insisted that beyond such actual cost and expense, these officers by force of this statute could agree to pay to the corporation such sum as they saw fit; and that as to such excess the property of the land-owner was taken from him without compensation. If this in point of fact be so, the conclusion

of the counsel of the respondents would be indisputably logical; the act would be plainly unconstitutional. But upon looking at the provisions in question, no trace of such an authority can be perceived. The act empowers the commissioners to contract with the company for the construction and maintenance of the works; and provides that they "shall pay said company such annual compensation therefor as such contract shall specify." But can it be reasonably pretended that by virtue of such an authority the commissioners have the right to agree to give more than a fair compensation for the labor to be performed and the capital employed? If an agent be empowered in general terms to make a contract for his principal, can he rightfully bind his principal to exorbitant terms? If he do so knowingly, it would be a fraud; and in the same way, these commissioners could not honestly stipulate to pay more than a fair price for that for which they contract. It will be kept in mind that with our present aim the only question is, What is the extent of the authority in this respect conferred by the statute on these officials? What they may intend, or what the corporation may expect them to do, cannot in the remotest degree touch the point of the legislative power which is now before us. It may be true, as was so forcibly urged on the argument, that it is the expectation of this corporation to effect an agreement with these commissioners by force of which they would be entitled to an interest the extent of which will be contingent on the ultimate success of the enterprise, and the consequent value of the lands reclaimed. I have no hesitation in saying that in my opinion any arrangement by which the compensation of the appellants for the work to be contracted for should be made to turn in any degree whatever on the future value of the lands, and which by any possibility could be in evident excess of the real cost of the works, would be illegal and void. Such an arrangement could not receive, as I think, judicial sanction under any circumstances, unless with the assent of all the owners of the land. The legislature would not be competent to authorize a contract of that description. This corporation must be regarded as a contractor to do the work incident to the enterprise in question; and all that the commissioners could agree to pay would be the expenses and a reasonable profit. They could not bind the land-owners to pay more than this, no matter how valuable their property by reason of this scheme to improve it might turn out to be. If a speculative remuneration

for the use of their money and labor is contemplated by the projectors of this scheme, they must utterly fail to carry it through by legislative assistance; for I think it beyond question that such a plan cannot be forced upon any owner of property against his will. A compact between the land proprietors and capitalists, whereby the latter should undertake the expense and risk of the improvement of the land for a stipulated return, to be graduated not so much by the actual expenditure as the anticipated increase in value of the lands, might be very reasonable in itself, and mutually beneficial; but it is a compact to which the assent of the land-owner is indispensable; and if under this law the commissioners should take upon themselves to enter into an agreement of this character with the Tide-water Company, I cannot but think it would be pronounced to be void as soon as it should be brought to the cognizance of the courts. But in the act in question nothing is perceived which appears to lend countenance to the formation of such a contract, and as has been before remarked, it is of no consequence to the present inquiry what the expectations of these corporators may be. This statute, in my opinion, does not warrant any contract by force of which the corporation shall be entitled to receive anything more than a fair equivalent for the work and money expended; and consequently I am enabled to hold it void on the ground above suggested, that it permits the commissioners to agree for a payment unlimited in extent, and in excess of such equivalent.

Nor do I perceive any constitutional objection in the mode prescribed by which the company is authorized to condemn lands necessary for the successful prosecution of the undertaking. Such mode is not unlike that which is usually found in the charters of railroad companies, and appears to be unobjectionable in all respects. Much was said on the argument with regard to the great damage which many of the land-owners would suffer in consequence of the works and embankments of the company cutting off the water-fronts of their lands, and the consequent loss of riparian rights; but if such rights exist, for these and all other damages of a similar kind the act provides full compensation. As to the circumstances that the corporators are strangers, and uninterested in these lands; that no oath is required of the commissioners; that it will be difficult for these officers to estimate the cost of the original works and the expense of maintaining them; and a multitude of similar incidents,—I pass by without comment,

for they obviously relate to the policy, and not to the validity, of the law, and whatever weight they may have been entitled to in legislative deliberations, they can exert no influence whatever over the decision of this court.

But looking more closely into the structure and effect of this statute, there appears to be a defect which seems to be both radical and incurable, and which must prevent its judicial enforcement. The defect alluded to is this: no provision is made for the indemnification of the owner of the land subjected to the operation of this law in case the expense of the improvement shall exceed the benefits which shall be conferred. The act authorizes the entire expense of drainage to be imposed upon the lands, whether such expense falls below or rises above the increase in value which may accrue to the lands by reason of such drainage. In other words, the cost of the enterprise is to be imposed as a burden on the lands, even though a full equivalent in the way of improvement shall not be given to the land-owner. Thus if the cost of drainage should be five dollars an acre, such sum is to be assessed on the land, although such land may not be benefited more than to the extent of three dollars an acre. The statute does not require that the apportionment of expense shall be limited as the maximum rate by the increase in the value to result from the improved condition of the land. Now, therefore, it seems to me obvious that if this scheme be carried into effect, in the event of an excess of expenses over benefits, private property *pro tanto* will be taken for public use without compensation. Where lands are improved by legislative action on the ground of public utility, the cost of such improvement, it has been frequently held, may to a certain degree be imposed on the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system, it is not considered that the property of the individual, or any part of it, is taken from him for the public use, because he is compensated in the enhanced value of such property. But it is clear this principle is only applicable when the benefit is commensurate to the burden,—when that which is received by the land-owner is equal or superior in value to the sum exacted; for if the sum exacted be in excess, then to that extent most incontestably private property is assumed by the public. Nor as to this excess can it be successfully maintained that such imposition is legitimate as an exercise of the power of taxation. Such an imposi-

tion has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest; the owners of these waste lands have a special concern in such improvement, so far as their lands will be in a peculiar manner benefited; beyond this, their situation is the same as that of the rest of the community. The consideration for the excess of the cost of the improvement over the enhancement of the property within the operation of this act is the public benefit; how, then, upon any principle of taxation, can this portion of the expense be thrown exclusively upon certain individuals? The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle which will permit the expenses incurred in conferring such benefit upon the public to be laid in the form of a tax upon certain persons who are designated, not indeed by name, but by their description as the owners of certain lands. A legislative act authorizing the building of a public bridge, and directing the expenses to be assessed on A, B, and C, such persons not being in any way peculiarly benefited by such structure, would not be an act of taxation, but a condemnation of so much of the money of the persons designated to a public use. And precisely in the same way would an exaction of the cost of these works embraced in the act before us, so far as such cost exceeded the benefit to the lands improved, be an assumption of the money of a few individuals for an end purely public. Nor should it be overlooked that if the scheme embraced in this act should be put in operation, and the expenses should exceed or equal the value of the land in its reclaimed condition, the inevitable result would be that the public would acquire the benefits contemplated by the rescue of the land from its present idleness, but the owner of the land would lose his entire property. Every consideration of equity stands opposed to the admission of such a rule of taxation. Nor do I consider it any answer to this last objection to suggest that there is no probability that the expenses of this improvement will equal the improved value of the land to be affected by it. It is clear that the cost of the work, and the value of the land in its altered condition, are not easy of estimation; it is certain many enterprises of a similar character have proved abortive, and have brought great losses upon their projectors; and it is enough, therefore, to say that the property owner cannot without his consent be made a

party in the hazards of such an enterprise. If the assessment to which he is subjected had been restricted so as not to exceed the benefits received by him, he would have run no risk, because he could not have suffered any loss; but as this law is framed, his land may be taken from him if the expenses of the project require the sacrifice. This, as has been already stated, would be in my opinion equivalent to a condemnation of the land, without compensation, for the public benefit; and as this may result from the natural operation of the statute, I am compelled to conclude that it is unconstitutional and void.

Thus far, this subject has been treated on general principles, and the deduction which has been drawn rests on those ordinary rules of justice which to a considerable degree form the basis of the social compact; but the result in this way attained has, it is conceived, the great weight of authority in its favor. In *Matter of Canal Street*, 11 Wend. 154, Chief Justice Savage, referring to a proceeding to open a street in the city of New York, says: "If the assessment is confirmed and enforced, the owners of the adjacent property must pay beyond the enhanced value of their own property, and all such excess is private property taken for public use without just compensation."

The following adjudications are also in point in support of the doctrine that in proceedings to effect public improvements the assessment of expenses on the property in the locality of such improvement must not exceed the value of the benefit conferred upon the land-owner: *Matter of Fourth Avenue*, 3 Wend. 452; *Matter of Albany Street*, 11 Id. 149 [25 Am. Dec. 618]; *Matter of William and Anthony Street*, 19 Id. 678; *Matter of Flatbush Avenue*, 1 Barb. 286; *Nichols v. City of Bridgeport*, 23 Conn. 204 [60 Am. Dec. 636].

The same view has likewise, I think, been recognized and approved by the supreme court of this state. In *State v. Mayor etc. of Newark*, 27 N. J. L. 185, two questions were presented; first of which was, whether an assessment made under the charter of the city of Newark on certain houses and lots owned by the New Jersey Railroad and Transportation Company, for their share of the expense of altering and widening a street, was an imposition upon the company within the meaning of the exemption from taxation contained in their act of incorporation. The assessment had been made, as required by the municipal charter, among the owners of the houses and lots intended to be benefited by the improvement, in propor-

tion to the advantage each had acquired. This assessment was held legal. In the opinion of Chief Justice Green, some of the decisions before referred to are cited with apparent satisfaction, and the doctrine that the assessment in order to be legal must not exceed the value of the benefits to the landowner is adopted. "The theory," says this opinion, "upon which such assessments are sustained as a legitimate exercise of the taxing power is, that the party assessed is locally and peculiarly benefited over and above the ordinary benefit which as one of the community he receives in all public improvements to the precise extent of the assessment. If the assessment made upon the railroad company is to be regarded as an exercise of the power of taxation, without reference to the special benefit conferred upon the company, then clearly the assessment is illegal." And in the same case, Mr. Justice Elmer, laying down the same rule, cites and places himself upon a similar train of authorities. "In the case of *Canal Bank v. Mayor of Albany*, 9 Wend. 244, and in *Matter of Albany Street*, 11 Id. 151 [25 Am. Dec. 618], the supreme court of New York"—such is his language—"treat an assessment of property benefited by an improvement made for the public use as a taking of property for public use, and hold that the amount assessed must not exceed the benefit actually received." It will be observed, therefore, that the principle upon which *State v. Mayor etc. of Newark*, 27 N. J. L. 185, and the other cases referred to are founded is the same which has been taken as the guide in the present investigation. That principle is one of great importance; for if the burdens of the community can be thrown upon a small class whose position is not peculiar or different from that of the rest of the people, there can be no security for private possessions. To permit individuals to be taxed to pay for a public improvement to the extent of the peculiar benefit which they receive from such improvement is not unjust or inequitable; but any exaction beyond this exclusively from such individuals is an act which involves the ability on the part of the community to confiscate for its own purposes the property of the citizen. Such power has not by the constitution of this state been placed in the hands of the legislature; and as the act in question has in the particular adverted to exercised such power, it is in my opinion void.

Before closing this subject, it should be remarked that this case, with regard to the grounds on which it rests, is to be dis-

tinguished from that class of proceedings by which meadows and other lands are drained on the application of the land-owners themselves. In the present instance, the state is the sole actor, and public necessity or convenience is the only justification of her intervention. But the regulations established by the legislative power, whereby the owners of meadow lands are compelled to submit to an equal burden of the expense incurred in their improvement, are rules of police of the same character as provisions concerning party-walls and partition fences. To these cases, therefore, the principle upon which the decision of the present case rests is not to be extended.

The decree of the chancellor should be sustained.

The decree was affirmed by the following vote:—

For affirmance, BEASLEY, C. J., and BEDLE, CLEMENT, DALRIMPLE, DEPUE, ELMER, FORT, KENNEDY, VREDENBURGH, WALES, and WOODHULL, JJ.,—11.

For reversal, none.

STATE, AS PORTION OF ITS INHERENT SOVEREIGNTY, has the power to appropriate private property to public use, where the public necessity or utility requires it, upon securing to the party whose property is taken a just compensation for any injury he may sustain: *Alexander v. Mayor*, 46 Am. Dec. 630, and note; *Brown v. Beatty*, 69 Id. 389, and note.

RIGHT OF EMINENT DOMAIN AND OF TAXATION may be exercised for the construction of works of public use and benefit; and the drainage of ponds and marshes is such use: *Anderson v. Kerns Draining Co.*, 77 Am. Dec. 63, and note 66.

LEGISLATURE IS SOLE JUDGE OF EXPEDIENCY of the exercise of the right of eminent domain for the purpose of making public improvements: *Varick v. Smith*, 28 Am. Dec. 417, and note 423.

RESULTING AND PECULIAR BENEFITS, to what extent may be set off against value of property taken for public use in the exercise of the right of eminent domain: *Symonds v. Cincinnati*, 45 Am. Dec. 529, and extended note 532; *Nichols v. City of Bridgeport*, 60 Id. 636, and note 648; *Brown v. Beatty*, 69 Id. 389, and note; *Wisconsin etc. R. R. Co. v. Waldron*, 88 Id. 100.

POWER TO ASSESS COSTS AND EXPENSES of public improvements on property peculiarly benefited is limited in amount to the extent of the benefit conferred, and any assessment beyond that limit is illegal and void, as a taking *pro tanto* of private property for public use without compensation: *State v. Jersey City*, 36 N. J. L. 57; *State v. Fuller*, 34 Id. 229; *State v. City of Newark*, 34 Id. 242; *State v. Mayor etc. of Hoboken*, 36 Id. 293; *Howell v. Essex Co. Road Board*, 32 N. J. Eq. 676; *State v. Fuller*, 39 N. J. L. 581; *State v. Mayor etc. of Newark*, 37 Id. 422; *Kean v. Driggs Drainage Co.*, 45 Id. 94, 96; *Chamberlain v. City of Cleveland*, 34 Ohio St. 561, all citing the principal case.

LEGISLATURE MAY EXERCISE POWER OF EMINENT DOMAIN and taxation for the purpose of draining and reclaiming marsh or meadow lands for the public benefit: *State v. Blake*, 36 N. J. L. 447; S. C., 35 Id. 211; *In re Lower Chatham and Little Falls*, 35 Id. 501; *In re Drainage along Pequest River*, 30 Id. 434; S. C., 41 Id. 178; *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 763. And it is within the power of the legislature to determine whether the enterprise or improvement is of such public utility as to justify a resort to the exercise of the right of eminent domain and taxation, and this independent of judicial review or interference: Id. 764; *Central R. R. Co. v. Pennsylvania R. R. Co.*, 31 Id. 487; *Black v. Delaware and Raritan Canal Co.*, 24 Id. 469, all citing the principal case.

WHERE LEGISLATURE HAS ORGANIZED SPECIAL BODY CORPORATE to perform a specific public work, the cost of which is to be raised in a manner expressly pointed out, which is unconstitutional, and no other lawful means for paying the expenses exists, the right of the corporation to act fails, and its proceedings will be annulled: *Kean v. Driggs Drainage Co.*, 45 N. J. L. 99, citing the principal case.

CASES
IN THE
SUPREME COURT
OF
NEW JERSEY.

PAUL v. SMITH.

[3 VROOM, 12.]

ANTEDATED NOTE — STATUTE OF LIMITATIONS. — Where at the time a promissory note was made it was antedated a number of years by the agreement of the parties, the statute of limitations begins to run against it from the time it comes due by its terms, and not from the time it was made.

THE opinion states the case. Judgment went for plaintiff in the court below.

A. Voorhees, for the defendant.

J. P. Jackson, for the plaintiff.

By Court, **ELMER, J.** This is a case certified from the circuit court of the county of Essex, in which court a verdict was rendered for the plaintiff, and a rule to show cause why there should not be a new trial was allowed, for an advisory opinion whether upon the case as proved the plaintiff was entitled to the verdict. The action was upon a promissory note made September 1, 1861, and dated September 1, 1856, whereby the defendant promised to pay a sum of money to the order of the plaintiff three months after the date. More than six years having elapsed from the time the note became due according to its terms to the commencement of the action, the question to be decided is, whether the statute of limitations was a good bar.

It appeared that some time in the year 1855 the defendant had given his note to the firm of Boyd and Paul for money

due them, and Boyd having died, and nearly six years having elapsed, the attorney who held the note called on him to give a new note, or to make a payment or an acknowledgment of the debt, so as to prevent the note from being outlawed. The defendant declined making a payment or a general acknowledgment of the debt, but on the first day of September, 1861, agreed to give the note in question, dated as it is, which was accepted, and the old note canceled.

There can be no doubt that the true time when a note was made may be shown if it was wrongly dated by fraud or mistake. A note takes effect only from its delivery, but if delivered after its date, it is then good by relation, and takes effect from its date: *Powell v. Waters*, 8 Cow. 670. A note may be antedated or post-dated, and in both cases is valid if no statute exists to the contrary; and where the purposes of justice require it, the real date may be inquired into, and effect given to the instrument: Story on Promissory Notes, sec. 48. The note in question was due immediately after its delivery. It was not antedated by mistake, or for any unlawful purpose, but to carry into effect the object of the parties. To alter the date, or to give it a legal effect different from that expressed on its face, is not required for the purposes of justice, but would be to make a new bargain for the parties, and thus to do injustice. The consideration was the debt originally due to Boyd and Paul, and the substance of the transaction disclosed by the evidence was, that by giving a new note dated about a year later than that originally made, the defendant promised to pay the debt, and remains liable to an action six years from the time the new note became due, but not longer. The case thus comes within the established rule that the acknowledgment of a debt, if accompanied by a promise to pay conditionally, is of no avail unless the conditions to which the promise is subjected by the defendant is complied with, or the event has happened upon which the promise depends. In my opinion, the statute of limitations is a good bar to the action, and the circuit court should be advised to order a new trial, the costs to abide the event.

STATE v. DONALDSON.

[3 Vroom, 151.]

CONSPIRACY. — It is an indictable conspiracy for a number of employees to combine together to compel their employer to discharge certain of their fellow-workmen upon pain of their quitting his employment in a body and by a simultaneous act.

CONSPIRACY. — Conspiracy to defraud others of their property may in itself constitute an indictable offense, though the act done or proposed to be done in pursuance of the conspiracy is not in itself indictable; the purpose designed to be accomplished becomes punitive solely from the fact of the existence of a confederacy to effect such purpose.

CONSPIRACY. — A combination will become an indictable conspiracy whenever the end proposed or the means to be employed are of a highly criminal character; or where they are such as indicate great malice in the confederates; or where deceit is to be used, the object in view being unlawful; or where the confederacy, having no lawful aim, tends simply to the oppression of individuals.

MOTION to quash an indictment charging a conspiracy, the nature of which will appear from the opinion.

T. N. McCarter, for the motion.

C. Parker, for the state.

By Court, *BEASLEY*, C. J. There is perhaps no crime an exact definition of which it is more difficult to give than the offense of conspiracy. That a combination of persons to effect an end, itself of an indictable nature, will constitute this crime is clear; nor is there any more doubt that, though the purpose the confederacy is designed to accomplish be not criminal, yet if the means adopted be of an indictable character, this offense is likewise committed. Thus far the limits are clearly defined, and embrace without exception all cases which fall within them. But when we proceed one step beyond the lines thus marked out, the cases which have been adjudged to be conspiracies appear to stand apart by themselves, and are devoid of that analogy to each other which would render them susceptible of classification. It is certain, however, that there are a number of cases in which neither the purpose intended to be accomplished nor the means designed to be used were criminal, which have been regarded to be indictable conspiracies. And yet it is obvious that in the nature of things it cannot be every collusion between two or more persons to do an unlawful act or an indifferent act by unlawful means which will constitute an offense of a public nature; for if this were so, a large portion of the transactions

which in the ordinary course of litigation between party and party comes before the courts would assume a criminal aspect, in which the state would have an interest. Indeed, I think it may be said that there are comparatively but few cases of combinations in which indictability does not attach, either to the end in view or to the instrumentalities devised, which are punishable by a public prosecution. It is true that, running to an extreme, in the case of *State v. Rickey*, 9 N. J. L. 293, Mr. Justice Ford insisted that up to his day there was but a single case extant—that of *Rex v. Cope*, 1 Strange, 144—which held that an indictment for a conspiracy would lie for a combination of two or more to commit a private injury which was not a public wrong; and he further insisted that the case referred to was erroneously decided; but Mr. Justice Ryerson did not, as is evident from the grounds upon which he rests his judgment, concur in that view; and the course of reasoning adopted by Mr. Justice Ford is now very generally admitted to be fallacious. In the case of *State v. Norton*, 23 N. J. L. 44, the view of the law expressed by Mr. Justice Ford is disapproved of, and Chief Justice Green, in stating his conclusion after an examination of the subject, remarks: "The great weight of authority, the adjudged cases no less than the most approved elementary writers, sustain the position that a conspiracy to defraud individuals or a corporation of their property may in itself constitute an indictable offense, though the act done or proposed to be done in pursuance of the conspiracy be not in itself indictable."

The rule of law thus enunciated appears to me to be the correct one. There are a number of cases which cannot be sustained upon any other doctrine. To this class belongs the decision that it was a conspiracy to induce a young female by false representations to leave the protection of the house of her parent in order to facilitate her prostitution: *Rex v. Lord Grey*, 3 Hargrave's State Trials, 519; *Rex v. Deleval*, 3 Burr. 1434. So a conspiracy to impoverish a tailor, and prevent him by indirect means from carrying on his trade: *King v. Eccles*, 3 Doug. 337; so a conspiracy to marry paupers, with a view to charge one parish and exonerate another: *Rex v. Tarrant*, 4 Burr. 2106; or to charge a man with being the father of a bastard: *Rex v. Armstrong*, 1 Vent. 304; *Rex v. Kimberty*, 1 Lev. 62; *Rex v. Timberley*, Sid. 68; or a combination to impoverish a class of persons: *Rex v. Sterling*, 1 Lev. 125; S. C., Sid. 174. These are all cases, it will be noticed, in which the

act which formed the foundation of the indictment would not in law have constituted a crime if such act had been done by an individual, the combination being alone the quality of the transactions which made them respectively indictable.

I conclude, then, that there is no uncertainty in this legal topic to this extent in addition to the principles before adverted to, that cases may occur in which the purpose designed to be accomplished becomes punitive as a public offense solely from the fact of the existence of a confederacy to effect such purpose. It is certainly not to be denied, however, that great practical difficulty is experienced whenever any attempt is made to lay down any general rules by which to discriminate that class of combinations which becomes thus punishable from those which are to be regarded in their results as mere civil injuries, remedial by private suit. It may be safely said, nevertheless, that a combination will be an indictable conspiracy whenever the end proposed or the means to be employed are of a highly criminal character; or where they are such as indicate great malice in the confederates; or where deceit is to be used, the object in view being unlawful; or where the confederacy, having no lawful aim, tends simply to the oppression of individuals. A careful analysis of the cases which have been heretofore adjudged will reveal the presence of one or more of the qualities here enumerated; to this extent, therefore, they may be relied on as safe criteria whereby to test new emergencies as they may be presented for adjudication.

In view, then, of these general deductions, and guided by the decisions above cited, let us turn our attention to the particular indictment now before us.

The substantial offense charged is, that the defendants combined to compel their employer to discharge certain of their fellow-workmen, the means adopted to enforce this concession being an announced determination to quit their employment in a body and by a simultaneous act. On the argument before this court, counsel in behalf of the state endeavored to sustain the indictability of this charge on the plea that the thing thus agreed to be done was an injury to trade, and consequently came within the express language of the statute on the subject of conspiracy: *Nixon's Digest*, 187, sec. 61. But I cannot concur in this view. An act to fall within this provision must be one which with directness inflicts an injury on trade, as, for example, a combination to depress any branch of

trade by false rumors. But in the case before us, the act charged, if it could be said to injure trade at all, did so not proximately, but remotely. It is true that at a far remove an injury to an individual manufacturer may affect trade injuriously; but in the same sense so it is true will an injury inflicted on a consumer of manufactured articles. But it is not this undesigned and incidental damage which is embraced within the statutory denunciation. On this account, I think the indictment does not present an affair which can be comprehended by the clause of the act which in this respect was relied on. But as it has already been decided by this court that the statute in question has not superseded the common law with regard to the crime of conspiracy (*State v. Norton*, 23 N. J. L. 40), the question still remains to be resolved whether the facts charged on this record do not constitute such crime upon general principles.

It appears to me that it is not to be denied that the alleged aim of this combination was unlawful; the effort was to dictate to this employer whom he should discharge from his employ. This was an unwarrantable interference with the conduct of his business, and it seems impossible that such acts should not be in their usual effects highly injurious. How far is this mode of dictation to be held lawful? If the manufacturer can be compelled in this way to discharge two or more hands, he can by similar means be coerced to retain such workmen as the conspirators may choose to designate. So his customers may be proscribed, and his business in other respects controlled. I cannot regard such a course of conduct as lawful. It is no answer to the above considerations to say that the employer is not compelled to submit to the demand of his employees; that the penalty of refusal is simply that they will leave his service. There is this coercion: the men agree to leave simultaneously, in large numbers and by preconcerted action. We cannot close our eyes to the fact that the threat of workmen to quit the manufacturer under these circumstances is equivalent to a threat that unless he yield to their unjustifiable demand they will derange his business, and thus cast a heavy loss upon him. The workmen who make this threat understand it in this sense, and so does their employer. In such a condition of affairs, it is idle to suggest that the manufacturer is free to reject the terms which the confederates offer. In the natural position of things, each man acting as an individual, there would be no coercion. If a single employee should

demand the discharge of a co-employee, the employer would retain his freedom; for he could entertain or repel the requisition without embarrassment to his concerns. But in the presence of a coalition of his employees, it would be but a waste of time to pause to prove that in most cases he must submit, under pain of often the most ruinous losses, to the conditions imposed on his necessities. It is difficult to believe that a right exists in law, which we can scarcely conceive can produce, in any posture of affairs, other than injurious results. It is simply the right of workmen, by concert of action, and by taking advantage of their position, to control the business of another. I am unwilling to hold that a right which cannot in any event be advantageous to the employee, and which must be always hurtful to the employer, exists in law. In my opinion, this indictment sufficiently shows that the force of the confederates was brought to bear upon their employer for the purpose of oppression and mischief, and that this amounts to a conspiracy.

I also think this result is sustained by all the judicial opinion which has heretofore been expressed on this point. In substance, the indictment in this case is similar to that in *Rex v. Ferguson*, 2 Stark. 489. Nor were the circumstances unlike; for in the reported case, the defendants were charged at common law with combining to quit and turn out from their employment in order to prevent their employer from taking apprentices; and although the case after trial and conviction was mooted in the king's bench on points of evidence, no doubt was suggested as to the indictable nature of the offense, and the defendants were accordingly fined and imprisoned. So in *Rex v. Bykerdike*, 1 Macl. & R. 179, the same doctrine was maintained. The indictment charged that the defendant with others conspired to prevent certain hands from working in the colliery, and the evidence showed that the body of the men met and agreed upon a letter, addressed to their employer, to the effect that all the workmen would strike in fourteen days unless the obnoxious men were discharged from the colliery; and Patterson, J., held that these workmen had no right to meet and combine for the purpose of dictating to the master whom he should employ, and that this compulsion was clearly illegal. These two cases, it will be observed, sustain with entire aptness the opinion above expressed, and I have not found any of an opposite tendency. As to the case of *Commonwealth v. Hunt*, 4 Met. 111 [38 Am. Dec. 346], it is clearly distinguish-

able, and I concur entirely as well with the principles embodied in the opinion which was read in the case as in the result which was attained. The foundation of the indictment in that case was the formation of a club by journeymen boot-makers, one of the regulations of which was that no person belonging to it should work for any master workmen who should employ any journeyman or other workman who should not be a member of such club. Such a combination does not appear to possess any feature of illegality, for the law will not intend without proof that it was formed for the accomplishment of any illegal end. "Such an association," says Chief Justice Shaw in his opinion, "might be used to afford each other assistance in times of poverty, sickness, and distress, or to raise their intellectual, moral, or social condition, or to make improvements in their art, or for other purposes." The force of this association was not concentrated with a view to be exerted to oppress any individual, and it was consequently entirely unlike the case of men who take advantage of their position to use the power by a concert of action which such position gives them to compel their employer to a certain line of conduct. The object of the club was to establish a general rule for the regulation of its members; but the object of the combination in the case now before this court was to occasion a particular result which was mischievous, and by means which were oppressive. The two cases are not parallel, and must be governed by entirely different considerations.

The motion to quash should not prevail.

CONSPIRACY. — Influence upon society determines whether it is criminal conspiracy to combine to accomplish an act, and not whether the act itself is criminally punishable: *Smith v. People*, 76 Am. Dec. 780. In the note to this case, the legal principles applied in the principal case are discussed. When the act agreed to be accomplished is not in itself unlawful, the facts constituting it must be set out: *Alderman v. People*, 69 Id. 321, and note.

Conspiracy to do an act which would be innocent if done by an individual may be indictable if the act amounts to a private wrong or a public mischief: *Muffin v. Commonwealth*, 40 Am. Dec. 527; *Commonwealth v. Hunt*, 38 Id. 346; see generally, upon this subject, *Commonwealth v. Eastman*, 48 Id. 596; *State v. McNally*, 56 Id. 650; *State v. Murphy*, 41 Id. 79.

A very full discussion of the law of conspiracy is had in *People v. Richards*, 51 Am. Dec. 75, and extensive note thereto, reviewing the entire subject.

THE PRINCIPAL CASE IS CITED and its doctrines affirmed in *State v. Cole*, 39 N. J. L. 324; and *State v. Hickling*, 12 Id. 208.

LAW v. STOKES.

[3 VROOM, 242.]

AGENT EMPLOYED TO MAKE SALES, AND SELLING ON CREDIT, IS NOT AUTHORIZED SUBSEQUENTLY TO COLLECT PRICE IN NAME of his principal; and payment to him will not discharge the purchaser unless he can show some authority in the agent, other than that necessarily implied in a mere power to make sales. Such authority may be shown by proof that he had such power expressly, or that his principal held him out as possessing it.

PRINCIPAL IS LIABLE FOR ACTS OF HIS AGENT within the power he has actually given him, and also in regard to things over which he knowingly permits him to assume authority. And an agent who has power to do a particular act has also power to do whatever usually belongs to the doing of it, or is necessary to its performance. '

AUTHORITY OF AGENT CANNOT BE QUALIFIED BY SECRET INSTRUCTIONS OF HIS PRINCIPAL, NOR ENLARGED BY the unauthorized representations of the agent.

PAYMENT TO SALESMAN OVER COUNTER, OR TO AGENT INTRUSTED WITH POSSESSION OF GOODS with unrestricted power to sell, will be held binding upon principal, as the agent is invested with apparent authority to receive such payment.

PAYMENT TO AGENT NO DISCHARGE.—Plaintiff's traveling salesman sold a bill of goods to defendant on credit. Plaintiff forwarded the goods to the latter, together with a letter and bill of items, upon the top of which was printed a provision that payment must be made to the principal, and that salesmen were not authorized to collect. Defendant's book-keeper received the bill, but the printed stipulation was not read, and afterwards defendant, at his own place of business, paid the agent for the goods. *Held*, that this did not discharge the debt to plaintiff.

THE opinion states the case.

W. S. Whitehead, for the plaintiff.

T. N. McCarter, for the defendant.

By Court, *DEPUE, J.* The plaintiff brought this action to recover the amount of a bill of goods sold by him to the defendant. The sale and delivery of the goods were not denied; and the only question in controversy at the trial was whether the defendant had paid for them.

The plaintiff, at the time of the transaction, was an importer of earthen-ware, doing business in the city of New York, and the defendant the keeper of a hotel at Long Branch, in this state.

On the 5th of July, 1865, the defendant purchased, at the the store of the plaintiff in New York, of one J. B. Sheriden, a bill of earthen-ware, amounting to the sum of \$320.37. It appears from the evidence in the cause that Sheriden was

employed by the plaintiff to sell goods for him, without any salary, for a commission on his sales. The goods in question were sold on a credit, and were to be paid for on the first day of the next August. The goods were shipped to the defendant on the sixth day of July, 1865; and on the same day the plaintiff wrote the defendant a letter, of which the following is a copy:—

"MR. W. STOKES, Long Branch.

"Dear Sir,—I beg to hand you bill of ware purchased by you, and duly forwarded as per direction. I trust you will find all satisfactory. Please remit amount direct to me.

"\$320.37.

Yours truly,

"HENRY D. LAW.

"August 1, 1865."

Inclosed with the letter was a bill of the goods, in the name of Henry D. Law as vendor, in the heading of which was printed plainly and conspicuously, in red letters, "All remittances on account, or in settlement of bills, must be made direct to the principal; salesmen not authorized to collect." On the 16th of August, 1865, the defendant paid Sheriden for the goods, at the defendant's hotel at Long Branch, and took from him a receipt for the same, signed, "J. B. Sheriden, for Henry D. Law." Sheriden never paid the money to the plaintiff, and has left the country.

The fact of this payment to Sheriden is not disputed, but the plaintiff insists that Sheriden had no authority to collect the money, and therefore the payment to him is no discharge.

Sheriden was a mere salesman for a commission. As such, he had authority to sell goods on credit, but not to discharge purchasers from debts incurred by them in purchasing goods through him of the plaintiff. An agent employed to make sales, and selling on credit, is not authorized subsequently to collect the price in the name of the principal, and payment to him will not discharge the purchaser, unless he can show some authority in the agent other than that necessarily implied in a mere power to make sales: *Seiple v. Irwin*, 30 Pa. St. 513. Such authority may be shown by proof either that the agent was expressly authorized to receive and discharge debts, or that he was held out by his principal to the public, or to the defendant, as having such authority.

A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but

also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent, within the scope of the authority he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible; because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established, it must flow from the act of the principal. And when established, it cannot on the one hand be qualified by the secret instructions of the principal, nor on the other hand be enlarged by the unauthorized representations of the agent. These principles find ample illustrations in the elementary books and in decided cases: 1 Parsons on Contracts, 44, 45; 2 Kent's Com. 620, 621; *Mechanics' Bank v. New York & N. H. R. R. Co.*, 13 N. Y. 632; *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 16 Id. 125 [68 Am. Dec. 678]; Story on Agency, sec. 127; *Dunning v. Roberts*, 35 Barb. 463; *Thurman v. Wells*, 18 Id. 500; 1 Am. Lead. Cas., 4th ed., 567.

Where an agent is intrusted with the possession of goods, with an unrestricted power to sell (*Higgins v. Moore*, 6 Bosw. 344), or payments are made over the counter of the principal's store to a shopman accustomed to receive money there for his employer (*Kaye v. Brett*, 5 Ex. 269), the authority to receive payment will be implied in favor of innocent persons, because the principal by his own act gives to the agent an apparent authority to receive such payment. But if the principal forbids such payments, and requires all payments to be made to himself personally, or to a cashier, and gives a customer notice thereof, the customer would have no right to insist upon the apparent rather than the real authority of the agent.

In the case now before the court, Sheriden had not the possession of the goods. The sale was made on a credit, and the payment was made to him, not over the plaintiff's counter at his place of business, but at the defendant's hotel. In most respects, the case is similar to that of *Seiple v. Irwin*, *supra*, where the payment to the agent was not sustained. He had

no express authority to collect the debt in question, nor was there any evidence that the plaintiff held him out to the public or to the defendant as having such authority. The letter of the plaintiff expressly directs that the money for this bill should be remitted directly to him. That letter, it is said, was never received by the defendant. The weight of the evidence is, that that letter was sent and was received before the payment was made to Sheriden. But independent of that, the evidence on the part of the defendant shows that the bill, which was produced by him at the trial, was received before the goods were unpacked, and that his son, who was his book-keeper, and had charge of receiving those goods, ticked off the goods on the bill, and told the defendant that it was correct.

The defendant testified that he never saw the bill until after the payment was made to Sheriden, and the son says that he did not read the heading of the bill,—that he had not time to do it. The plaintiff did all that prudence and good faith required of him to prevent the defendant falling into an error in regard to the authority of his salesman. Immediately upon the shipment of the goods he wrote the letter to the defendant, requiring him to remit direct to him, and inclosed in it the bill of the goods, on the face of which was printed a notice that salesmen were not authorized to collect. That bill, at least, was in the hands of the defendant's son, who was his book-keeper, and authorized to pay bills, and had charge of comparing the goods with the bill, and who was present when the money was subsequently paid to Sheriden. Not to have seen the directions in the bill-head was the grossest negligence, and to permit a party to defend under the protection of his own carelessness would be to offer a premium for negligence, and open the door to fraud, especially so when the party is himself bound to see to it that the person with whom he transacts business as an agent has the authority which he assumes. *Capel v. Thornton*, 3 Car. & P. 352, is not a parallel case with this. In that case the defendant dealt with Ellsworth, the agent, as principal, without any knowledge of his agency. The coal for the price of which the suit was brought was ordered of Ellsworth, and the defendant paid Ellsworth. The only evidence of notice of his agency before the bill was paid was the vendor's ticket, sent with the coal, and delivered to the defendant's footman, and not shown to have reached the defendant. After the payment

was made, a notice was sent to the defendant by the plaintiffs to pay the amount to them, or to their clerk, and not to Ellsworth. The defendant had no knowledge of the agency, and the footman was not her agent in relation to that business, and the notice which the defendant did receive came after the payment was made. These circumstances render that case wholly unlike the case now before the court.

It was further insisted on the argument that there was evidence of a subsequent ratification, sufficient to go to the jury. It does not appear that any such question was raised at the trial, and if it had been, there is no evidence in the cause that would have justified the jury in finding a ratification by the plaintiff of the unauthorized payment to Sheriden.

The verdict is against the evidence, and contrary to law, and should be set aside and a new trial granted; costs to abide the event.

DEBTOR WHO PAYS MONEY TO PERSON NOT DULY AUTHORIZED TO RECEIVE IT, and without inquiry into his authority, must bear the loss if such person appropriates the money to his own use: *Cooley v. Willard*, 85 Am. Dec. 296. Possession of signed receipt is sufficient evidence of authority to demand payment of the receipted liability, if the receipt is signed by the proper person: *Nash v. Union Mut. Ins. Co.*, 69 Id. 65.

AGENCY. — Agent has only such powers as are expressly given, or necessary and proper for carrying out those expressly given: *Wood v. Goodridge*, 52 Am. Dec. 771. General or special agency impliedly includes all power necessary, proper, or usual to effectuate the purposes for which the authority was created: *Benjamin v. Benjamin*, 39 Id. 394. One who permits another to hold himself out to the world as his agent is liable for his acts to persons who gave credit to him in his capacity of agent: *Pursley v. Morrison*, 63 Id. 424.

AUTHORITY OF AGENT CANNOT BE LIMITED BY PRIVATE INSTRUCTIONS not known to the person who deals with him: *Walker v. Skipwith*, 33 Am. Dec. 161; *Lobdell v. Baker*, 35 Id. 358; *Toussie v. Lempick*, 55 Id. 195; *Barber v. Hall*, 60 Id. 301.

BROKAW v. NEW JERSEY R. R. & TRANSP. Co.

[3 VROOM, 325.]

CORPORATION MAY COMMIT TRESPASS, and be held liable in an action therefor.

LIABILITY OF CORPORATION FOR ACTS OF ITS SERVANTS OR AGENTS WILL DEPEND UPON the same principles which govern the liability of a master for the acts of his servants.

CORPORATION WILL BE LIABLE FOR TRESPASS COMMITTED BY ITS AGENT, if the act of the agent was authorized by the rules and regulations of the

company, or was necessary to accomplish the purposes of his employment. In such a case, it will be liable even for his unnecessary violence.

AUTHORITY GIVEN BY BOARD OF DIRECTORS OF CORPORATION DOES NOT ALWAYS BIND IT. To fix the liability of a corporation for the tortious act of one of its employees, done in obedience to the command of its officers, the act must be connected with the transaction of the business for which the company was incorporated.

JOINER OF PARTIES. — An individual may be joined as party defendant in an action against it for trespass.

THE opinion states the case.

H. V. Speer, for the plaintiff.

I. W. Scudder, for the defendants.

By Court, *DEPUE, J.* The declaration in this case charges that the New Jersey Railroad and Transportation Company, by their servants, and William Campbell, the other defendant, with force and arms assaulted the plaintiff, and ejected and expelled him from a certain car in which he was riding, on the New Jersey railroad, and wounded, bruised, and ill treated him.

To this declaration the defendants have filed a general demurrer, and upon the argument two questions were raised: 1. Whether an action of trespass for an assault and battery can be maintained against a corporation; and 2. Whether in such action an individual can be joined as a co-defendant with a corporation.

In the earlier cases, it was held that an action of trespass could not be maintained against a corporation aggregate, for the technical reason that a *capias* and *exigent*, the proper process in actions of trespass, would not lie against a corporation; but this technical objection was not uniformly yielded to, as instances of actions of trespass against corporations are to be met with as early as the Year-books: Angell and Ames on Corporations, sec. 385; notes to *Maund v. Monmouthshire Canal Co.*, 4 Man. & G. 454. As corporations became more numerous and were multiplied, until aggregated capital seeking investment for the purposes of business is generally invested under acts of incorporation to protect individuals from personal liability, technical objections which stood in the way of subjecting corporations to actions founded on torts have been entirely swept away, and corporations have been held liable for all torts, the same as individuals. That they may be sued in trover, case, trespass *quare clausum fregit*, trespass *vi et armis*, and ejectment is abundantly established by the

cases cited by Green, C. J., in *State v. Morris and Essex R. R. Co.*, 23 N. J. L. 367.

A corporation is liable for injuries resulting from neglect to repair a bridge where the obligation to repair lies on them: *Ward v. Newark and Pompton Turnpike Co.*, 20 N. J. L. 323; for obstructing the flow of water, whereby lands are overflowed: *Tinsman v. Belvidere Delaware R. R. Co.*, 25 Id. 255 [64 Am. Dec. 565]; *Chestnut Hill Turnpike Co. v. Rutter*, 4 Serg. & R. 6 [8 Am. Dec. 675]; for making an unlawful distress: *Smith v. Birmingham and Staffordshire Gas Light Co.*, 1 Ad. & E. 526; for deceit and fraudulent representations: *Fogg v. Griffon*, 2 Allen, 1; *National Exchange Co. v. Drew*, 32 Eng. L. & Eq. 1; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; for fraud in issuing spurious stock: *New York & N. H. R. R. Co. v. Schuyler*, 38 Barb. 534; S. C., 34 N. Y. 30; for wrongfully and maliciously obstructing a party in his business: *Green v. London Omnibus Co.*, 7 Com. B., N. S., 290; for maintaining a vexatious suit: *Goodspeed v. East Haddam Bank*, 22 Conn. 530 [58 Am. Dec. 439]; for a malicious libel: *Whitfield v. S. E. R'y Co.*, El. B. & E. 115; *Philadelphia, W., & B. R. R. Co. v. Quigley*, 21 How. 202; and for an assault and battery and false imprisonment: *Eastern Cos. R'y Co. v. Broom*, 6 Ex. 314; *Chilton v. London etc. R. Co.*, 16 Mees. & W. 212; *Roe v. Birkenhead L. & C. R'y Co.*, 7 Ex. 36; *Seymour v. Greenwood*, 6 Hurl. & N. 359; *Goff v. Great Northern R. R. Co.*, 3 El. & E. 672; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465 [64 Am. Dec. 83]; *Hewett v. Swift*, 3 Allen, 420; *Evansville and Crawfordsville R. R. Co. v. Baum*, 26 Ind. 70.

And generally it may be stated that a corporation is liable *civiliter*, the same as a natural person, for the tortious acts of its servants or agents in the course of their employment, committed by the authority of the corporation, express or implied, whether such acts fall within the designation of forcible, negligent, malicious, or fraudulent torts, and without regard to the form of action by which the appropriate remedy is sought: *Philadelphia and Reading R. R. Co. v. Derby*, 14 How. 486; *New York & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, and *per Davis, J.*, on p. 49; *Bissel v. Michigan Southern R. R. Co.*, 22 N. Y. 258; *Philadelphia, W., & B. R. R. Co. v. Quigley*, 21 How. 202; *per Pollock, C. B.*, in *Roe v. Birkenhead L. & C. R'y Co.*, 7 Ex. 40; Story on Agency, sec. 308.

And upon the trial, the question whether the corporation is liable for the acts of its servants or agents will depend upon

the same principles which govern the liability of a master for the acts of his servants. Where it is sought to hold the master liable for the trespass of his servant, the rule is somewhat different from what it is when the gist of the action is negligence. The distinction is tersely stated by Parke, B., in *Sharrod v. London & N. W. R'y Co.*, 4 Ex. 585, as follows: "The maxim, *Qui facit per alium facit per se*, renders the master liable for all the negligent acts of the servant in the course of his employments, but that liability does not make the direct act of the servant the direct act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant, but not trespass, unless, as was said by the court in *Morley v. Gainsford*, 2 H. Black. 412, the act was done by his command,—that is, unless either the particular act which constituted the trespass is ordered to be done by the principal, or some act which comprised, or some act which leads by a physical necessity to, the act complained of."

If the trespass was committed by the agent of the company willfully or of his own malice, under color of discharging the duties of his employment, or if he has departed beyond the line of his duty to commit a trespass, the company will not be liable. But if the act of the agent was authorized by the rules and regulations of the company, or was necessary to accomplish the purposes of his employment, the company is answerable, even for the unnecessary violence of the agent: *Philadelphia and Reading R. R. Co. v. Derby*; *Seymour v. Greenwood*; *Eastern Cos. R'y Co. v. Broom*; *Roe v. Birkenhead L. & C. R'y Co.*, *Hewitt v. Swift*,—cited above; *Smith on Master and Servant*, 151; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479 [51 Am. Dec. 315].

In considering the question whether the agent has the authority of the corporation so as to make it answerable for his act, the purposes for which the company was incorporated must not be overlooked. An authority given even by the board of directors in express terms will not in all cases be the authority of the corporation. The directors are only agents themselves, and their powers are necessarily limited within the scope of the purposes for which the corporation was created, beyond which they are not authorized to bind the corporation. To fix the liability of a corporation for the tortious act of one of its employees, done in obedience to the commands of its officers, the act must be connected with the transaction of the business for which the company was incorpo-

rated. If the directors should order an agent to take a person out of his house and beat him, the corporation could not be held for the assault and battery; or if the directors of a banking company should purchase a steamboat and engage in transporting passengers, the corporation would not be liable for the misfeasance or non-feasance of agents employed in that business. But if the directors of a corporation having power to hold lands order an agent to enter on lands and take possession of them for the legitimate uses of the company, his entry, if unlawful, will be the trespass of the corporation. So if the directors, acting in their official capacity, adopt rules and regulations for the transaction of the corporate business of the company, and provide for the enforcement of such rules and regulations, and authorize its agents or servants to carry them into effect, the corporation will be liable for the acts of such agents or servants in the course of such employment: In *Eastern Cos. R'y Co. v. Broom*, 6 Ex. 325, Patterson, J., says: "An action of trespass for assault and battery will lie against a corporation whenever the corporation can authorize the act done, and it is done by their authority"; and Erle, C. J., in *Green v. London Omnibus Co.*, 7 Com. B., N. S., 301, says: "The ground of demurrer is, that the declaration charges a willful and intentional wrong, and that the defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie. But the whole of the acts that are charged against the defendants are acts connected with driving vehicles, and the defendants are a company incorporated for the purpose of driving omnibuses, and therefore the acts alleged to have been done by them are all acts which are within the scope and object of their formation."

In *National Exchange Co. v. Drew*, 32 Eng. L. & Eq. 1, the fact that the company is benefited by the transaction in which the fraud was committed is assigned as a reason for holding it liable for the fraud of their directors.

In *Philadelphia, W., & B. R. R. Co. v. Quigley*, 21 How. 202, the libel for which the corporation was held answerable was contained in a report made by the directors to the company of the result of an investigation into the accounts of an employee, which the directors had authority to investigate, and were authorized by a meeting of the stockholders to make public. See also 2 Hilliard on Torts, 473.

The demurrer admits that the servants of the corporate defendant had competent authority to commit the assault and battery, and the case comes directly within the cases above

cited. Whether in point of fact the servants of the company had such authority, and the corporation is liable for their acts, is a question of fact to be determined at the trial.

The second ground of demurrer is, that William Campbell is joined as a defendant with the New Jersey Railroad and Transportation Company. The joinder is proper; for in trespass, all the actors are principals, and may be joined in one suit; and an individual and a corporation may be joined as defendants in the same suit: 1 Vin. Abr., tit. Abatement, Z, p. 32; Brown on Corporations, pl. 24.

Both the defendants are charged as principals, and it does not appear that Campbell was the servant of the company, and if it did, the joinder would still be proper. A joint action of tort in the nature of trespass may be maintained against a corporation and its servants for a personal injury inflicted by the latter in discharging the duties imposed on him by the corporation: *Hewett v. Swift*, 3 Allen, 420; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465 [64 Am. Dec. 83].

In considering this case, we have not overlooked the case of *Orr v. Bank of the United States*, 1 Ohio, 38 [13 Am. Dec. 588], which was much relied on by the defendants' counsel. That case proceeds on principles long since obsolete, and is against all the later authorities.

The demurrer is overruled.

CORPORATION IS LIABLE FOR ACTS OF ITS AGENTS or servants, within the scope of their authority, in the same way as an individual person is: *Pennsylvania R. R. Co. v. Vandiver*, 82 Am. Dec. 520. In the note to this case, the law is laid down in harmony with the reasoning of the principal case. A corporation is liable for wrongful acts of its servants done in its employment, and may even be indicted for acts of misfeasance or non-feasance: *Donaldson v. Mississippi etc. R. R. Co.*, 87 Id. 391. Action for assault and false imprisonment will lie: *Moore v. Fitchburg R. R. Corp.*, 64 Id. 83. So will trespass *quare clausum fregit*: *Main v. North Eastern R. R. Co.*, 75 Id. 725. Corporation is liable for torts of agents within apparent scope of their authority, or in pursuance of the general scope of the charter: *Jones v. Western Vermont Railroad Co.*, 65 Id. 206. It is liable for its agents' acts, declarations, and false representations, to the same extent as a natural person is: *Henderson v. San Antonio etc. R. R. Co.*, 67 Id. 675; see also *Tinsman v. Belvidere etc. R. R. Co.*, 69 Id. 565, and the notes to the above cases. The principal case is cited, where the liability of corporations is discussed, in *Dock v. Ellinabetsown S. Mfg. Co.*, 34 N. J. L. 316, and *McDermott v. Evening Journal*, 14 Id. 492.

JOINDER OF CORPORATION WITH ITS SERVANT IN ACTION FOR TORT: See *Moore v. Fitchburg R. R. Corp.*, 64 Am. Dec. 83, and note. Officers of corporation can only bind it when acting within their authority, or when their acts relate to the purposes for which the corporation was organized: *Hall v. Auburn Turnpike Co.*, 87 Id. 75; *Clark v. City of Des Moines*, 87 Id. 423; *Blau v. Water and Mining Co.*, 81 Id. 132.

VANCE v. ERIE RAILWAY COMPANY.

[3 VROOM, 334.]

CORPORATION MAY BE GUILTY OF MALICIOUS PROSECUTION, AND ACTION THEREFOR WILL LIE AGAINST IT.

THE opinion states the point.

J. Fleming, for the plaintiff.

I. W. Scudder, for the defendants.

By Court, DEPUE, J. This action is an action of trespass on the case for malicious prosecution. To the plaintiff's declaration, the defendants have filed a general demurrer, and upon the argument various grounds of demurrer were urged, all of which have been disposed of in the opinion, delivered at the present term, in *Brokaw v. New Jersey R. R. & T. Co.*, 32 N. J. L. 328 [*ante*, p. 659], except the specific objection that an action for malicious prosecution cannot be maintained against a corporation. It is argued by counsel, that a corporation, being an ideal entity, is incapable of entertaining malice, which is an intent of the mind, and is an essential ingredient of an action for malicious prosecution.

We have seen by the cases cited in *Brokaw v. New Jersey R. R. & T. Co.*, *supra*, that a corporation is liable for false and fraudulent representations, for maliciously obstructing a party in his business, for maintaining a vexatious suit, and for a malicious libel, in each of which actions an intent of the mind is quite as much involved as in an action for malicious prosecution.

In *Stevens v. Midland Counties R'y Co.*, 10 Ex. 352, the question whether an action for malicious prosecution would lie against a corporation was mooted in the court of exchequer, and Alderson, B., expressed an opinion that it would not lie, assigning as a reason that in order to support the action it must be shown that the defendant was actuated by a motive of the mind, and that a corporation has no mind. Platt, B., was of opinion that there was no evidence that the corporation had authorized the prosecution; and upon the point whether the action would lie said: "But I do not say that a case might not arise in which a motive might be assigned upon which the action could be maintained." Martin, B., the only other judge who sat on the cause, concurred with Platt, B., as to the insufficiency of the evidence, and declined to give any opinion on the question whether the action could be maintained.

In *Whitfield v. South Eastern R'y Co.*, EL B. & E. 113, which was an action against a corporation for a malicious libel, the declaration was demurred to for the same reason that has been assigned here, and the opinion of Alderson, B., was cited by counsel in support of the demurrer. The demurrer was overruled, and Lord Campbell, in delivering the opinion of the court, said: "But considering that an action of tort or of trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate, both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation."

In *Green v. London Omnibus Co.*, 7 Com. B., N. S., 290, which was an action for wrongfully, vexatiously, and maliciously obstructing and annoying the plaintiff in his trade, on demurrer to the declaration it was argued that the action could not be maintained, on the same ground that malice was the gist of the action, and that a corporation cannot as such be actuated by malice. The declaration was sustained, and Erle, C. J., in delivering the opinion of the court, disposed of the argument of the counsel with the remark that the doctrine relied on—that a corporation, having no soul, cannot be actuated by malice—is more quaint than substantial.

The same argument was addressed to the supreme court of the United States in *Philadelphia, W., & B. R. R. Co. v. Quigley*, 21 How. 202, which was an action against a corporation for a libel, and was by that court repudiated as a reason for exempting a corporation from liability for a libelous publication.

If actions for malicious libel, for vexatious suits, for vexatiously and maliciously obstructing another in his business, for willful trespasses, and for assault and battery, in each of which the motives and intent of the mind are directly involved, can be maintained against a corporation aggregate, no reasons founded on principle can be suggested why an action for malicious prosecution should not also be sustainable against a corporation.

The reasons assigned by Erle, C. J., in *Green v. London Omnibus Co.*, *supra*, for holding a corporation answerable for a vexatious and malicious interference with the business of another, the extreme mischief and inconvenience which would

follow from holding companies incorporated for the purpose of carrying on trade exempt from liability for intentional acts of wrong, and driving those they have injured to seek a doubtful remedy against their officers or servants, who may be wholly unable to answer the compensation which the jury may award, apply with equal force to actions for malicious prosecution.

When the nature of the action is considered, it comes strictly within the principles by which the actions above enumerated are maintainable. It must appear that the prosecution was instituted maliciously, and without probable cause. In a legal sense, any act done willfully to the injury of another, which is unlawful, is, as against that person, malicious, and it is not necessary that the perpetrator of such act should be influenced by ill-will towards the individual, or that he entertain and pursue any bad purpose or design: *Commonwealth v. Snelling*, 15 Pick. 337; 2 Greenl. Ev., sec. 453. The proof of malice need not be direct. It may be inferred by the jury from the want of probable cause: 2 Greenl. Ev., sec. 453, per Lord Campbell, in *Whitfield v. South Eastern Ry Co.*, El. B. & E. 113, and involves nothing more than a wrongful act intentionally done.

To hold a corporation amenable to this particular action is strictly in accordance with well-settled legal principles. The wrong for which the action is the appropriate remedy is susceptible of being committed by a corporation by means of its agents and servants. No technical difficulties are in the way of the institution of the suit, and at the trial the cause can be conducted upon the established rules of evidence. To afford redress against a corporation for other intentional wrongs done by them, and deny it in this case, is an anomaly which can only be justified because of the interposition of insurmountable obstacles. No such obstacles stand in the way of the prosecution or maintenance of the action.

Under what circumstances a corporation is liable for the tortious acts of its servants or agents, even when done in obedience to the orders of its directors or officers, has been considered in the case of *Brokaw v. New Jersey R. R. & T. Co.* [*ante*, p. 659]. Whether in this case the servants or agents of the defendants in making the arrest complained of were acting by the authority of the corporation is a question to be determined at the trial in accordance with the rules stated in that case.

Demurrer overruled.

CORPORATE LIABILITY FOR TORTS: See *Brokaw v. New Jersey R. R. & T. Co.*, *ante*, p. 659, and note, for discussions of principles of law similar to those announced in the principal case.

THE PRINCIPAL CASE IS CITED to the point that an action for libel will lie against a corporation, and that malice may be shown against it, in *McDermott v. Evening Journal Assoc.*, 43 N. J. L. 488-494; and to much the same point in *Dock v. Elizabethtown S. Mfg. Co.*, 5 Id. 316.

STATE v. SHORTS AND TILNEY.

[3 VROOM, 308.]

LOTTERY. — Where the proprietors of a public exhibition advertised to give away at their performance a large number of valuable presents to the spectators, the proprietor to appear upon the stage and call out numbers at random, and the person holding the ticket which corresponded with it to be given any of the prizes which the proprietor might select, this constitutes a lottery within the meaning of the statute; and it is not relieved of that character by the fact that the proprietor reserves the right to refuse to make any distribution at all, or to refuse to give a present to a person whose personal appearance did not suit him.

INDICTMENT for maintaining a lottery, to which defendants pleaded guilty, subject to the opinion of the court as to the form and sufficiency of the indictment, in connection with the following facts: Defendants exhibited a panorama, which they advertised extensively in the streets by means of handbills. These handbills stated that eight hundred valuable presents of divers values would be distributed among the spectators; that each one upon entering the hall would be given a ticket, upon which would be printed a number. After the close of the performance, defendant Shorts would appear upon the platform and call out at random any number, whereupon the holder thereof was to come upon the stage, and if Shorts liked his appearance, and considered that he would be a valuable friend for his performance, and would assist in advertising it, he would give him any of the presents he pleased; but if he felt so disposed, he was under no obligation to give him anything. Defendants further reserved the right to refuse to give any presents to any one.

C. K. Hall, for the state.

E. T. Green, for the defendants.

By Court, BEASLEY, C. J. In this case there are two matters for decision,—the one relating to substance, the other to form.

The first of these questions—and that is the material one—is, whether in point of fact the defendants have set up a lottery within the prohibition of the statute of this state in that respect. The act referred to declares that “all lotteries for money, goods, wares, merchandise, chattels, lands, tenements, hereditaments, or other matters or things whatsoever shall be and are hereby adjudged to be common and public nuisances,” and that all persons who “shall within this state publicly or privately erect, set up, open, make, or draw any such lottery” is made liable to indictment.

On the argument, it was insisted that the transaction now in question before this court was not a lottery, on account of the presence in it of the element of free will on the part of the exhibitor with regard to the distribution of presents. The conduct of the affair was this: Each person at the door of the show got a ticket with a number upon it. At the close of the exhibition, one of the defendants called at will any number, and the person holding the corresponding ticket presented himself, when, if the exhibitor liked his appearance, he presented him with one of the articles advertised as gifts. It was also one of the terms of this project that, at the option of the defendants, the circumstance of a distribution of presents should be dispensed with. It was this control or reserve of power in the proprietors of the show which was relied on to prevent the contrivance from possessing that fortuitous quality which in law is essential to the constitution of a lottery. But this line of argument is far too subtle to be sound. Taking a practical view of the thing, its real nature cannot be misunderstood. It is clearly a lottery if tested by any of the ordinary definitions of that term. “A lottery,” says Johnson, is a “game of chance; a distribution of prizes by chance.” This ingredient of chance is obviously the evil principle against which all prohibitory laws are aimed. It is by this means that cupidity is solicited; for if fortune be propitious, in consideration of the trivial price of a ticket, a return of value is to be expected. This temptation was undoubtedly offered to the public by these defendants. It is true that in this particular scheme the chances of profit would appear to a considerate observer to have been quite unduly in favor of the projectors. Indeed, the chances of the ticket-holder were precarious in the extreme. He had various risks to run: 1. He must find the exhibitor in a mind to distribute gifts; 2. The number of his ticket must tally with the number called; and

3. His personal appearance must receive approval. The chances of success were therefore slender; but still there was a chance of a disproportionate gain, and the offer of this or any other such chance is the stimulus to the spirit of gaming, which the law prohibits. Any person who obtained a gift, as it is called, under the operation of this scheme, owed his success to his fortune in drawing from the door-keeper the ticket with the lucky number upon it. But for this fortuitous circumstance he would have failed, and it was this opportunity which he purchased with his ticket. In fact, it may be said with truth that the winner in this particular lottery has had a series of strokes of good fortune; for he has found by accident the projector in the propitious mood, he has drawn the favored number, and he has not been rejected on account of his personal appearance,—circumstances which look like the results of mere casualty, for it is not pretended that the projector, either in the matter of volition as to the giving of presents, or of approbation as to the recipients of them, founds his action on any settled rules of conduct which would appear reasonable to himself or to others.

My conclusion is, that this was a game of chance, and consequently a lottery, and none the less so because of those reservations of control over it, by the adroit use of which the getters-up of the game were sure in all substantial respects to be the winners. It is an affair conspicuously within the mischief at which the statute is leveled; the particular traits of it, above noticed, appear like devices to evade the law. But the law regards not mere semblance, but the substance of things, and consequently these devices, however ingenious, cannot be successful. The defendants, in carrying into effect the programme above specified, committed an offense indictable by the laws of this state.

With regard to the second point, I think the objections to the indictment must prevail. It does not contain that certainty in the description of the offense which is essential in criminal pleading. The act prohibits "lotteries for money, goods," etc. This pleading, in charging the offense, does not allege that the lottery set up by the defendants was for money or anything of value. It is true that afterwards it avers that the defendants, "by means of said lottery and scheme of chance, . . . did expose and set to sale" certain articles. But the statute is silent as to the sale of things by lottery; and although this statement of a sale may imply that, in some pos-

sible way, there was a disposition of things of value by lot, yet this necessary circumstance should not be left to conjecture. At all events, it is clear the proof does not sustain this allegation of a sale, and as the allegation in the form in which it is pleaded is material, the case of the state must fall on this present record.

Let the oyer be advised accordingly.

GIFT ENTERPRISES as within statutes against gaming: See note to *State v. Smith*, 33 Am. Dec. 136. As to what constitutes a lottery, see *State v. Clarke*, 66 Id. 723, and note. The principal case is cited *arguendo* in *State v. Lovell*, 39 N. J. L. 462, where pool-selling was held to be a lottery within the statute.

STATE v. DOTY.

[S VROOM, 408.]

CONTEMPT. — Power of judicature implies the right to exercise that function undisturbed by improper influences affecting it extraneously; and an act done without the presence of the court, by a person neither a party to a suit nor an officer of the court, may amount to a contempt.

SUMMARY PUNISHMENT FOR CONTEMPT IS NOT PROHIBITED BY CONSTITUTIONAL PROVISION that "the right of trial by jury shall remain inviolate."

IT IS CONTEMPT OF COURT FOR STRANGER TO MAKE ARRANGEMENT WITH JUROR TO SIGNAL the views of the jury to him after the jury have retired to deliberate.

DEFENDANT was tried for embracery, and acquitted, and a rule was then entered for him to show cause why he should not be attached for contempt in holding intercourse with a jurymen. This proceeding was based upon the sworn admission of the defendant as follows: During the progress of a certain trial, he fell in with one of the jurors, and remarked to him that if he could find out how the jury stood after they retired, they might make some money. The juror asked him how, and defendant answered, by betting on the result. The juror asked how this could benefit him, and was answered that he would be benefited one half of what defendant won. Upon the juror asking how he could inform him, defendant said that if the jury was likely to disagree, for him to come to the window with a piece of paper in his mouth; and if they were to agree, he was not to have anything in his mouth. Defendant said nothing about the merits of the case, nor did he say how he wished the verdict to go.

McLean, for the state.

Parker, for the defendant.

By Court, BEASLEY, C. J. The first objection interposed against this proceeding was one relating to the authority of the court to deal with as a contempt an act done out of its presence by a person who was neither a party to the suit nor an officer of the court. But the limitation of judicial authority thus set up is clearly inconsistent with the rules of law, and with the ancient as well as modern practice upon this subject. It has been always held that the power of judicature implies the right to exercise that function undisturbed by improper influences affecting it extraneously. A court would fail of necessity to accomplish the end of its institution if it could not maintain order and enforce obedience to its precepts. The authority is derived from necessity, and the authority ceases only when such necessity ceases. The illustrative cases are numerous. Thus it is a contempt of court in all persons who resist the execution of its writs, or treat contumeliously its officers in the lawful discharge of their duties; so, to solicit a witness to disobey a subpoena; to offer insult to a judge for his conduct while on the bench; or to publish anything relating to a cause pending in court, and which has a tendency to prejudice the public mind upon the subject, or which contains improper strictures on the conduct of counsel, witnesses, or parties;—all these are familiar instances which in repeated adjudications have been visited penally as contempts: *Commonwealth v. Dandridge*, 2 Va. Cas. 408; *Respublica v. Oswald*, 1 Dall. 319; *People v. Few*, 2 Johns. 290; 4 Bla. Com. 258; *Rex v. Clement*, 4 Barn. & Ald. 218.

Nor do I think there is any force in the other objection which was urged, that the infliction of a summary punishment in the present case would be an infringement of that clause of the constitution of this state which guarantees to the citizen a trial by jury. The constitutional declaration is, that "the right of a trial by jury shall remain inviolate," and the effect of the clause is to establish the privilege by the highest of sanctions, but not to enlarge it. The provision operates as a restraint upon the legislative power; the right is not to be impaired or diminished, but is to remain as it existed at common law, and according to the practice of the courts anterior to the establishment of the fundamental law. In this sense it is that this provision has been heretofore received, for

it has never been doubted that since the date of the constitution summary proceedings, such as convictions before magistrates under the act relating to vice and immorality, and others of a similar character, and having an ancient origin, are undeniably legal. Neither can it escape observation that the opposite hypothesis would render illegal all punishments for contempt committed in the presence of the courts, for in that class of cases the party proceeded against, if the present point be well taken, would likewise clearly be entitled to a trial by the country.

The only remaining cause for setting aside this proceeding suggested by counsel was that in point of fact the transaction did not disclose any contumacy to the authority of the court on the part of the defendant. And on this head it was urged that the acquittal of the defendant on the indictment which was based on this same affair must have the effect to purge him from every suspicion of impropriety in his conduct in this particular. But it is obvious that the behavior of the defendant may have been highly illegal and reprehensible, and yet may not have gone to the extreme height of technical embracery. And this is the construction I put upon his conduct. The law strictly forbids all intercourse of every description upon the subject of the cause on trial between jurors and all other persons. To effect this end, the court commits them in charge of one of its sworn officers. The consequence must be, therefore, that any attempt to invade this seclusion is illegal, and a palpable violation of judicial authority. It may be some extenuation, but certainly cannot be a vindication, of such conduct to say that no effort was made by the illegitimate communication to turn the juror from the line of his duty. The legal inhibition is against all intercourse with the jury during their consultation, and it is manifest any sequestration short of this would be entirely illusory, for it is certain if the door were thrown open that no mode could be devised so that only proper intelligence would be permitted to pass. When, therefore, in this case the defendant solicited the juror to signal to him the views of the jury, it was an endeavor to induce the juror to do that which was inconsistent with his duty, and with the order of the court directing his isolation. It would be unfortunate indeed if such an act were not punishable as a contempt of the authority of the court. I know nothing which calls for keener vigilance on the part of judges than everything which has a tendency to expose jurors to the arts of the friends or followers of liti-

gants. It is every day's experience that the course of justice is constantly thrust aside by this obstacle. The evil would certainly be greatly aggravated if the courts were powerless to prevent all communication of every kind whatsoever between the jury and the rest of the community whilst the verdict is being formed. But the jury cannot be isolated unless the court is prompt to punish those who infringe in the slightest degree the order directing such isolation. I think public policy requires that no one should escape punishment who is found in any respect invading the privacy of the jury-room.

The present case, in my opinion, affords a single example of the danger attending such misbehavior. The defendant requested the juror to give him a certain signal if the jury were likely to disagree. On the strength of the intelligence thus to be received, a bet was to be made, in which the juror was to have an interest. Now, suppose this scandalous proposition had been accepted, the signal given, and the bet made, can any one deny that the juror in question would have occupied a position inconsistent with the fair discharge of his duty? After conveying the information of the disagreement of the jury, his interest would lead him to continue that state of affairs. He would neither change his own views, nor attempt to change the views of his fellows, except at a supposed pecuniary sacrifice. Such would have been the result if this scheme of the defendant had been realized. The attempt to realize it was a flagrant contempt of the judicial authority; and I have no more doubt that the defendant in this case deserves punishment than I have of the power of the court to inflict it.

Rule made absolute.

COURTS HAVE INHERENT POWER TO PUNISH CONTEMPT of their authority by fine and imprisonment, independent of any statutory provision: *Ex parte Adams*, 59 Am. Dec. 234; *Neel v. State*, 50 Id. 209. Power to commit or fine for contempt is essential to the existence of every court: *State v. Woodfin*, 42 Id. 161. This power extends at common law not only to acts which directly and openly insult or resist the power of the court or the persons of the judges, but to consequential, indirect, and obstructive contempts, which obstruct the process, degrade the authority, or contaminate the purity of the court: *Neel v. State*, 50 Id. 209; *Williamson's Case*, 67 Id. 374.

CONSTITUTIONAL GUARANTY OF TRIAL BY JURY does not prevent courts from summarily punishing person guilty of contempt; this provision relates to such cases only as were formerly tried by jury: *Neel v. State*, 50 Am. Dec. 209; *Ex parte Grace*, 79 Id. 529.

KINNEY v. CENTRAL RAILROAD COMPANY.

[3 VROOM, 407.]

AGREEMENT IN CONSIDERATION OF FREE TICKET TO RELEASE RAILROAD COMPANY FROM ALL LIABILITY FOR NEGLIGENCE of its servants is valid; and the company will not be liable to the holder of such free ticket for an injury which occurred through such cause.

ACTION by administrators, founded upon the death of their intestate, alleged to have been caused by the negligence of defendants' servants. At the time in question, it appeared that deceased applied for a free ticket over defendants' road; that he was told that if he received such pass he would have to be responsible for all risks of accidents; and that he thereupon accepted a ticket upon which was printed the following: "The person who accepts this free ticket thereby assumes all risk of accident, and in consideration of its receipt, expressly agrees that the company shall not be liable under any circumstance, whether of negligence of their agents or otherwise, for any injury to the person, or for any loss or injury to his or her property while using this ticket."

J. F. Dumont and J. F. Randolph, for the plaintiffs.

J. G. Shipman and B. Williamson, for the defendants.

By Court, BEASLEY, C. J. The question in this case which we are now called on to decide is not as to the construction of the contract out of which the rights and liabilities of the parties respectively arose, but exclusively as to its legality. It appeared to demonstration at the trial that the deceased, with full knowledge and of his own accord, entered into the agreement, for the consideration of a free passage, to assume the risk to himself of all accidents which might occur through the negligence of the agents of the railroad company. An accident from such cause did happen, causing the death of the deceased, and the naked point for judgment is, whether the defendants are legally dispensed from responsibility by force of such agreement.

This inquiry I must be permitted to regard as quite aside from many of the topics so learnedly discussed before us upon the argument. We were referred to many cases with regard to the incapacity of the common carrier to force, by means of general notices or the delivery of tickets containing special stipulations, contracts upon their employers; and cases were cited to show that agreements couched in general terms, im-

posing the risk of carriage on the bailor, would not be interpreted to extend to losses proceeding from the negligence of the bailee or his agents. These subjects are not considered pertinent, because in the present case it was clear that the contract between the deceased and the carriers received the voluntary assent of the former, and because such contract in clear terms gave immunity to the carriers from the negligent acts of their servants. As I have already remarked, the inquiry goes to the point singly as to the legal validity of agreement which these parties, beyond all question, entered into in good faith.

But another line in the reasoning of the counsel of the plaintiffs seems to require a more deliberate notice. It was insisted that a common carrier could not, even by express contract, exempt himself from liability for his own negligence. But even on this head it does not strike my mind that it is necessary for any present purpose to enter upon the discussion of this vexed question. The duty of the common carrier is *sui generis*. His obligations are so peculiar, it is difficult, perhaps impossible, to apply closely by way of analogy the rules of law which control his conduct and give rise to his responsibilities to the situation of other contractors. By the usual principles of law, the common carrier is, with narrow exceptions, an insurer of the safe delivery of the goods coming to his hands. So, too, he is bound, as a general thing, to carry all the goods brought to him in the ordinary course of his business. These are obligations falling upon the common carrier by force of his employment, which is of a *quasi* public character. When, therefore, questions arise as to the right of these social agents, so to speak, to free themselves by contract or otherwise from the burdens set upon them by law, it is obvious that considerations which are totally foreign to ordinary cases enter into the discussion. Consequently all reasoning on this theme must turn on motives of policy and general convenience. And it is on this account that I think that a solution of the question, whether a common carrier can or cannot exempt himself by express agreement from the obligation which he takes from the law to conduct his business without negligence, cannot have a controlling effect upon the present subject of inquiry. This conclusion is founded in the fact that I do not regard the contract now in controversy as one which the defendants have made in their character of common carriers. I think it plain they must in this respect be placed on the foot

of gratuitous bailees. Every test which can be applied to the case will show that the defendants on this occasion, in this particular matter, were not common carriers. The deceased did not bargain with them on the basis of any such employment. If he had seen fit, he had a right to deal with them in their general character, but he did not do so. As a member of society, it was his right, upon paying his fare, to require of these defendants to carry him upon the terms which the law imposed upon them; but instead of exacting this right, he solicited a mere benevolence, the discharge of which it would not be reasonable to consider as any part of the business of the carrier. The legal existence of this contract, therefore, cannot be impugned on the ground so often advanced where common carriers are concerned,—that it is unwise to permit those public employees to throw off any given part of their common-law liability. The question ventilated must be settled by such rules of law as are applicable to the ordinary class of gratuitous bailments, or of persons rendering an unbought courtesy.

Nor does the objection that this contract is not consistent with good morals or sound policy appear to me of much weight. This consideration was urged on the argument in rather a wider form than the facts will warrant, for the proposition was that it is pernicious and immoral to allow a person to contract for a discharge from the effects of his own negligence. But the question to be decided is narrower, the case showing merely the presence of negligence in the servants of the defendants, but none whatever in the defendants themselves. Consequently we have to do simply with the more limited proposition, Does the law prevent a person in a matter not connected with any public employment to stipulate for an immunity from the results of the omissions or oversights of his own agents?

Now, I think it will be plain to any one who will survey this ground that there is nothing in natural justice which would hold the master responsible for the negligence of his servant. With relation to the moral code, a man performs in this particular his whole duty when he exercises proper prudence and care in the selection of competent agents to conduct his affairs. The rule of *respondet superior* is one of great severity, and has been adopted, not from its intrinsic equity, but from its general convenience. It subsists incontestably as an established legal technicality. Can it not be waived, and another

rule adopted on any special occasion between party and party? I confess to an entire inability to comprehend the force of the objections to this being done. The fallibility of all human agency is an imperfection not to be eliminated from any transaction dependent on the employment of such means. In the absence of an express contract, the law, in order to lay down a fixed rule, throws the liability on him who employed the agent; but what in the nature of the transaction is there which should prevent any party contracting with such principal to take on himself the risk of the servant's misconduct? It was suggested that the tendency of any exemption of the principal would be to remove from common carriers one of their motives to exercise care in their business; but the two-fold answer is, first, that the present discussion does not, as has been already shown, relate to the contract of a common carrier; nor, second, does it involve any consideration of the misconduct of the principal,—the whole question being, whether the master may not avoid the consequences, not of his own but of his servant's omissions. The contract before us, so far as its terms are at present involved, did not contemplate the introduction into the affair of any element of danger which was not necessarily inherent in it,—that is, the fallibility of human conduct, over which the carrier had no control. The transaction is virtually this: the carrier says to the passenger, I have employed careful and skillful men to manage my locomotive and cars; but they are human, and they may fail in their duty, to your danger. The passenger says, In consideration of a free passage, I will run that risk. The bargain is struck on these grounds, and I am clear that it would be a great refinement to impeach it as being prejudicial to public interests.

Nor do I find such a contract in any respect incompatible with legal principles on analogous subjects. Agreements of fire insurance are familiar instances much in point, for they are in general stipulations for indemnification against the results of a party's own negligence or that of his employees. In truth, it is obvious that the doctrine asserted in support of the case of the plaintiffs would, if carried to its logical result, subvert equally with the present contract almost the entire system of bailments; for that system is erected in part on the principle of allowing an immunity to the negligence of the bailee. Thus, in the case of a deposit, the depositary in the Roman law was answerable for the thing left with him,

in case of its loss, only for fraud; and in the English and American law, such bailee cannot be held unless negligence so gross as almost to be evincive of bad faith can be imputed to him. In such cases, then, the bailor virtually agrees to discharge the bailee from all responsibility for ordinary neglects such as careless men are apt to fall into, and the law does not scruple to enforce such contracts. Such agreements in kind are not distinguishable from the stipulation now sought to be impeached. Another analogy will be found in that long line of decisions which have so completely established the proposition that even common carriers can by express agreement limit, to some extent at least, their common-law liability. In reply to observations on the impolicy of such a relaxation, Baron Parke (*Carr v. Lancashire and Yorkshire R. R.*, 14 Eng. L. & Eq. 340) compressed the argument into a sentence, and said: "We ought not to fritter away the meaning of contracts merely for the purpose of making men careful."

From these considerations, I have come to the conclusion that the contract which the deceased made with the defendants was valid in law, and under the circumstances presented at the trial afforded a full defense to this action.

It will be perceived from the following citations that a similar doctrine has been held by the courts of New York: *Wells v. New York Central R. R. Co.*, 24 N. Y. 181; *Perkins v. New York C. R. R. Co.*, 24 Id. 208; *Welles v. New York C. R. R. Co.*, 26 Barb. 641; *Bissell v. New York Cent. R. R. Co.*, 25 Id. 443.

It has not seemed to me proper to consider the other question mooted on the argument, whether the memorandum indorsed on the ticket in question was of such a character as to require a United States revenue stamp. Such objection was not made at the trial, and it is now quite too late to interpose it. The rule is entirely settled that if an imperfection of this character is relied on, the point must be raised before the instrument is put in evidence: *Robinson v. Lord Vernon*, 7 Com. B., N. S., 231; *Field v. Wood*, 7 Ad. & E. 114; *Israel v. Benjamin*, 3 Camp. 40.

The defendants are entitled to judgment on the verdict.

AGREEMENT EXEMPTING CARRIER FROM NEGLIGENCE. — In *Illinois Central R. R. Co. v. Read*, 87 Am. Dec. 260, different reasoning was adopted from the above, and a somewhat different conclusion arrived at. It was there held that an agreement exempting a railroad company from liability for any injury to person or property of a free passenger was valid so far as the consequences

of its ordinary negligence was concerned, but not as regards its gross negligence, recklessness, or willful misfeasance; and that the acceptance of a free ticket established an agreement indorsed thereon to the effect that the railroad company will not be liable for any injury to the person or property of the passenger, so far as it is consistent with the rules of public policy: See the note to this case.

PAYMENT OF FARE AS AFFECTING LIABILITY OF CARRIER OF PASSENGERS: *Noton v. Western R. R. Co.*, 69 Am. Dec. 623, and note; *Todd v. Old Colony etc. R. R. Co.*, 80 Id. 49.

COMMON CARRIER CANNOT BY CONTRACT DIVEST ITSELF OF LIABILITY FOR NEGLIGENCE OR WANT OF CARE: See note to *Western Trans. Co. v. Newhall*, 76 Am. Dec. 776; *Roberts v. Riley*, 77 Id. 183; *Steele v. Townsend*, 79 Id. 49, and notes.

THE PRINCIPAL CASE IS AFFIRMED in *Kinney v. Central R. R. Co.*, 34 N. J. L. 573, where it was held that a contract that in consideration of a free passage a passenger will assume the risk of injuries to his person from the negligence of the servants of the railroad company is valid; and that a passenger who knowingly receives a free ticket with such a contract indorsed upon it will be bound by the terms of such contract, and cannot recover for injuries from such negligence. The principal case is also cited in *Ohio etc. R. W. Co. v. Selby*, 47 Ind. 485, to the point that a common carrier may be exempted from liability for a loss occasioned by ordinary negligence.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

CLAPP v. FULLERTON.

[34 NEW YORK, 190.]

INCOMPETENT WITNESS AS TO SOUNDNESS OR UNSOUNDNESS OF TESTATOR'S MIND. — The opinion of a witness who did not attest the execution of a will, and who is not specially qualified by scientific knowledge to judge of the soundness or unsoundness of the testator's mind, is not competent evidence as to that fact. In testifying as to matters within his own observation, bearing upon the competency of the testator, he may characterize as rational or irrational the acts and declarations to which he testifies; but his examination must be limited to his own conclusions from the specific facts he discloses.

SAME. — EXCEPTION TO THIS RULE IS ADMITTED IN CASE OF ATTESTING OR SUBSCRIBING WITNESSES TO WILL, whose opinions are always competent, and are admitted *ex necessitate* as throwing light upon the *res gestæ*. They may state their own convictions as to the testator's capacity, for they were immediate actors, and may well retain a recollection of the general result of their observation after the particular circumstances have been effaced by lapse of time.

JUDGMENT AT LAW WILL BE REVERSED WHERE IMPROPER EVIDENCE WAS ADMITTED; as where a witness who did not attest the execution of a will, and was not qualified to speak as an expert, was permitted to testify generally that in his opinion the testator was of sound mind; but this rule has its limitations in equity.

ON APPEAL FROM DECREE OF SURROGATE, REVIEW IS IN NATURE OF RE-HEARING IN EQUITY; and the admission of improper evidence on the original hearing before the surrogate, as where a non-expert or non-professional witness was permitted to testify as to his opinion of the testamentary capacity of the testator, furnishes no ground for reversing the decision in the supreme court, if the facts established by legal and competent testimony are plainly sufficient to uphold it.

PROBATE OF WILL SHOULD NOT BE REJECTED SIMPLY BECAUSE TESTATOR, IN OTHER RESPECTS COMPETENT, entertained the mistaken idea that his

eldest daughter was illegitimate, if such idea was not the effect of an insane delusion, but of slight and inadequate evidence acting upon a suspicious, jealous, weakened, and failing mind.

COSTS OF BOTH PARTIES MAY BE CHARGED UPON ESTATE where there was probable cause for contesting the validity of a will, as shown by the conduct of the testator.

APPEAL from a judgment of the supreme court affirming a decision of the surrogate court admitting to probate the last will of Oliver Selfridge, deceased. The testator died in his seventy-seventh year. He left property amounting to eighteen hundred or two thousand dollars. The contest was between his daughters, Mrs. Fullerton and Mrs. Clapp, who were his only children and sole legatees. Selfridge made the will in question on December 10, 1861, giving all his property to Mrs. Clapp, except a legacy of one hundred dollars to Mrs. Fullerton. In a previous will, executed in May, 1860, he had bequeathed one thousand dollars to Mrs. Fullerton, directing the residue to be equally divided between her and her sister, Mrs. Clapp, and explaining the inequality of the bequests by the statement that he considered he had given as much as one thousand dollars to Mrs. Clapp in the sale of his homestead to her husband; and this statement was confirmed by the proof, which showed the sale to have been for about two thirds the value of the property. The will was contested by Mrs. Fullerton on various grounds; but those principally relied on were the imbecility or lunacy of the testator, and undue influence on the part of Mrs. Clapp, the proponent. Some witnesses on the part of the contestant, and who were not the subscribing witnesses or experts, stated the facts on which their opinions were based, and testified that in their judgment the testator was incapable of transacting business during the last year of his life. This proof was met by evidence of a similar character from witnesses on the part of the proponent, who in some instances, without stating the facts on which their judgment was based, testified that his mind in their opinion was sound. Exceptions were taken on both sides to the admission of this description of evidence. Evidence was adduced by the contestant tending to show that during the last year of his life the testator was laboring under the insane delusion that his first wife, who had been dead some forty-five years, had been guilty of infidelity, and that Mrs. Fullerton, the elder of their two daughters, was illegitimate, though born in wedlock a year after his marriage. It appeared that he communicated his impression on this subject, with the grounds on which it

rested, to his brother, Oliver Selfridge, to his sister, Mrs. Wilson, and to his niece, Mrs. McDugall. These communications seem to have been in each case privately made, and they were all subsequent to the execution of the first will. The principal fact on which his suspicion was based was a declaration by his wife in her last illness, made in a condition of delirium produced by disease of the brain, and recalled after a long interval of years, when his physical and mental faculties were enfeebled by sickness and age. Selfridge's first wife bore an excellent character, and he retained for her an enduring affection down to the time of his second marriage. The contestant had been his favorite daughter; and in the will, made two years before his death, he had given her about two thirds of his property. It was proved by the declaration of the testator that the question of Mrs. Fullerton's legitimacy had been the subject of conversation between him and the proponent and her husband. It was also proved by proponent's admission that this suspicion had its origin in the mind of her father nearly two years before his death, and in the interim which intervened between the execution of the first and the second will. It was discredited in the strongest terms when he communicated it to his brother, his sister, and his niece; but it did not appear from the evidence to have been discouraged on any occasion by the proponent or her husband. Rumors tending to give it a color of credit were set afloat after the testator's death, and though not directly traceable to any particular source, they derived significance from the subsequent intimation by the proponent to Mrs. Wilson that her mother had been too intimate with her father's brother. As evidence of undue influence, the following facts were relied on: 1. The existence of this unfounded suspicion or delusion, and the subsequent gift of the bulk of his property to the daughter with whom he resided, and who was alone interested in giving countenance to the imputation; 2. His previous known and acknowledged preference for the contestant as between her and his younger daughter; 3. His rooted prejudice against Clapp, the husband of the proponent, and his frequent complaints, running through a series of years, and down to the time of his death, that he had been the victim of imposition on the part of his son-in-law, who had dealt with him in a spirit of meanness, duplicity, and deceit; 4. His constant discontent with his residence in the family of his daughter during the last year of his life, and his repeated attempts to induce the

contestant and others to furnish him with a home more congenial; 5. His repeated complaints that letters passing between him and Mrs. Fullerton were intercepted, and that he was treated in the family with disrespect, inattention, and neglect; 6. His loss of certain notes which he held against Clapp, and his evident suspicion that they were in the possession of the maker. To repel the imputation of undue influence, the testimony of an Irish employee of Clapp was relied on, and who testified that the testator had made him his confidant in respect to the will, and that he gave the bulk of his property to Mrs. Clapp, "to keep her out of the poor-house," under the belief that Mrs. Fullerton was in less needy circumstances. Clapp's father testified that the testator had intimated that "there had been wrongs committed, and he was glad he had been spared to rectify some of them"; and added that Mrs. Clapp "had been very kind, and that he had or would make her restitution." The proponent's son, T. W. Clapp, testified that the following declarations were made to him by the testator: That he had heard "there was to be a turning over of matters and things in general and his will when he died"; that "he had made a will once to please some others, and now he had made a will to suit himself"; that "his wife said on her death-bed that Eliza was not his daughter, but that she was then insane and out of her head; that he always claimed her as his daughter, and always would, and that he did not know anything to the contrary himself." Other facts are stated in the opinion.

James S. Coon, for the appellant.

E. Hill and A. D. Wait, for the respondent.

By Court, PORTER, J. The surrogate seems to have assumed that non-professional witnesses who did not attest the execution of the will were competent to express an opinion on the general question of testamentary capacity. When a layman is examined as to facts within his own knowledge and observation, tending to show the soundness or unsoundness of the testator's mind, he may characterize as rational or irrational the acts and declarations to which he testifies. It is legitimate to give them such additional weight as may be derived from the conviction they produced at the time. The party calling him may require it to fortify the force of the facts, and the adverse party may demand it as a mode of probing the truth and good faith of the narration. But to render his

opinion admissible even to this extent, it must be limited to his conclusions from the specific facts he discloses. His position is that of an observer, and not of a professional expert. He may testify to the impression produced by what he witnessed; but he is not legally competent to express an opinion on the general question whether the mind of the testator was sound or unsound.

An exception to this rule is recognized in the case of attesting witnesses. They are present at the very act of execution, and their opinions on the general question of testamentary capacity are admitted *ex necessitate*. It is the policy of the law to provide all possible safeguards, for the protection of the heir as well as the testator. No light is excluded in reference to the *res gestæ* which can be furnished by the immediate actors. The subscribing witnesses may be required to state not only such facts as they remember, but their own convictions as to the testator's capacity; for it may well happen that on so vital a point they may retain a clear recollection of the general result long after the particular circumstances are effaced by lapse of time or obscured by failing memory.

In the present case, the attesting witnesses were not called upon to express their judgment; but others, not qualified to speak as experts, were permitted to testify generally that in their opinion the testator was of sound mind. That this ruling was wrong is shown with great clearness and force in the opinion delivered by Judge Bockes at the general term. If the error had occurred on the trial of an ordinary action at law, it would have called for a reversal of the judgment in accordance with the rule on this subject as heretofore limited and defined by the successive decisions in the case of *De Witt v. Barley*, 9 N. Y. 371; S. C., 17 Id. 340, 347.

The court below was right, however, in holding that the error was not fatal if it be apparent upon the whole case, irrespective of the evidence improperly admitted, that the testator was clearly competent, and that the will was properly admitted to probate. On appeals from the decrees of surrogates, the supreme court succeeds to the jurisdiction and authority of the old court of chancery. The review is in the nature of a rehearing in equity; and the admission of improper evidence on the original hearing furnishes no ground for reversing the final decision if the facts established by legal and competent testimony are plainly sufficient to uphold it: *Schenck v. Dart*, 22 N. Y. 420, 421.

In this case, the proof is clear that the statutory forms were observed in the execution of the will, and that the testator had sufficient intelligence to understand the nature and effect of its provisions. The vigor of his mental faculties was impaired, but not to such an extent as to disable him from making a testamentary disposition of his property. He retained a clear recollection of the provisions of his previous will; and his determination to change them was thoughtful and deliberate, whether the motives that induced it were rational or irrational. The case bears no analogy to that of a testator who contributes nothing to his will but a series of nods and a cross, or a signature traced by a guiding hand stronger and steadier than his own.

Before he directed the preparation of the instrument, he had avowed his intention to make Mrs. Clapp his principal legatee. He assigned as a reason for the alteration the change which had recently occurred in the relative pecuniary circumstances of his elder and younger daughter. He went a considerable distance on foot and alone to procure the previous will, which he had deposited at the house of a friend. He intrusted an intelligent professional gentleman with the preparation of a new will, and personally gave him the instructions from which it was drawn. It was subsequently executed in the presence of the draughtsman and subscribing witnesses, and in the absence of the principal beneficiary. He wrote his own signature, requested the witnesses to attest it, and declared the instrument to be his last will. He subsequently communicated to others the fact of its execution, and the motives which induced him to give the bulk of his property to the proponent. In view of these undisputed facts, the opinions of non-professional witnesses on the general question of testamentary capacity could have no possible weight; and all such testimony should be disregarded as needless to the proponent, and harmless to the contestant.

It was also insisted that aside from the issue of imbecility, the testator was disqualified by lunacy. This claim rested on the assumption that during the last year of his life he was laboring under an insane delusion as to the legitimacy of his elder daughter. To sustain the allegation, it is not sufficient to show that his suspicion in this respect was not well founded. It is quite apparent from the evidence that his distrust of the fidelity of his wife was really groundless and unjust; but it does not follow that his doubts evince a condition of lunacy.

The right of a testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust.

In determining the question whether his impression in regard to his wife was due to insane delusion, attention must be given to the circumstances in which it originated, and to his physical and mental condition at the time it obtained lodgment in his mind. She died at the age of twenty-six, when he was thirty years old; he married again after an interval of twenty years; he had no children by the second wife, and was grievously disappointed at her death by a bequest of a portion of her property to her relatives. Some three years before her decease, he sold his house to Clapp, and from that time until his death he was a boarder in the proponent's family. He was uneasy and discontented, seeking some opportunity to find a more agreeable home, charging his daughter with irreverence and neglect, and her husband with cupidity and fraud. He was overtaken by disease, and became irritable and infirm. He was strongly attached to his elder daughter in Ohio, and in his first will, made some two years before his death, he gave to her the greater portion of his property. After the execution of this will, his infirmities increased; he became nervous and querulous, and was easily moved to tears; he was conscious of the decay of his faculties, and apprehensive of the approach of death. His memory became unretentive of recent occurrences, and as usually happens in such cases, his mind was constantly recurring to the incidents of early life. It is one of the compensations of age that when current events cease to imprint themselves upon the memory, those of former years are often reproduced with the freshness of first impression, and become the leading topics of reflection and conversation.

The testator, in view of his own approaching end, very naturally recurred to the circumstances attending the death of his first wife, which had been the most marked event in his own family history. He unfortunately recalled a declaration made by her on her death-bed, that the contestant, though born in wedlock, was not his daughter. He knew that it was uttered in the delirium of a fatal disease of the brain, but he permitted it to be a source of uneasiness and disquietude, until

it made an impression on his mind in his then feeble and morbid condition which it had not produced when the incident occurred. He connected it with the circumstances of his occasional absence from home during the first year of his married life, of her light-hearted youth and gayety, and of suspicions which had fallen upon some who had been early associates of the family; and he was thus led to apprehend that her statement, though made when she was delirious, was more significant than he had deemed it at the time. He admitted that he had attached no importance to the declaration when it was made, and expressed his surprise that it had not impressed him more deeply. He spoke of it, however, only to his nearest relatives, and evidently appreciated the embarrassment and delicacy of alluding to it at all. He continued to refer to Mrs. Fullerton in terms of kindness and affection, acknowledged that he did not and could not know that she was not legitimate, and declared that he should always continue to claim and treat her as his daughter.

It is manifest that his original judgment was right. He dismissed the delirious expression of his wife as of no moment when all the circumstances were fresh, and his mind healthy and vigorous; but when his affection for her had waned with the lapse of time, and he was no longer able to recall the grounds of his former confidence in her fidelity, the recollection of the incident produced undue impression on a mind enfeebled by age and disease. The fact should be referred to weakness and credulity rather than to insane delusion. The repose of families has often been disturbed on grounds as slight and trivial as those which misled the testator. It is evident that he did not arrive at a clear and settled conviction that he had been wronged in the conjugal relation; but he was brought to a condition of doubt, suspense, and uncertainty, which not only saddened the last year of his life, but entailed unmerited reproach on the names of his wife and eldest daughter, and doubtless co-operated with other causes in changing the direction of the inheritance.

The allegation of undue influence rests mainly on inferences to be deduced from facts which are proved only by the declarations of the testator. These are too vague and indeterminate in their nature to lead to a clear and satisfactory conclusion. The mind is involuntarily predisposed against the will by its apparent inequality and injustice; many of the circumstances surrounding the transaction cloud it with

grave suspicion. The strong probability is, that the testator's false impression in regard to his wife received encouragement from those who should have been the first to disabuse him of his error. It appears from the testimony of his sister, Mrs. Wilson, that even after his death the proponent affected to credit the scandalous imputation; though it would seem from the nature of the case that the only absolute assurance she could have, either of her own or her sister's legitimacy, was the purity of the mother whose honor she seemed ready to impugn. We do not think the proof of undue influence rises to a degree of strength which would justify the rejection of the will.

There was probable cause for contesting the validity of the instrument; and while we think the judgment should be affirmed, it should be with directions that the costs of both parties be paid from the estate.

Judgment affirmed; costs of both parties to be paid out of the fund.

DAVIES, C. J., and MORGAN, J., dissented.

COMPETENCY OF OPINIONS OF NON-PROFESSIONAL WITNESSES AS TO SANITY OF TESTATOR, OR HIS CAPACITY TO MAKE WILL: See extended note to *Dickinson v. Barber*, 6 Am. Dec. 60; *Grant v. Thompson*, 10 Id. 119; *Clark v. Fisher*, 19 Id. 402; *Kinne v. Kinne*, 21 Id. 732; *Rambler v. Tryon*, 10 Id. 444, note 450; *Potts v. House*, 50 Id. 329; extended note to *Joyce v. Maine Ins. Co.*, 71 Id. 538; *Farrell's Adm'r v. Brennan's Adm'r*, 82 Id. 137; *Rumyan v. Price*, 86 Id. 459.

COMPETENCY OF OPINIONS OF ATTESTING OR SUBSCRIBING WITNESSES AS TO CAPACITY OF TESTATOR TO MAKE WILL: *Potts v. House*, 50 Am. Dec. 329.

EXTREME OLD AGE OF TESTATOR IS NOT OF ITSELF SUFFICIENT TO RENDER HIM INCOMPETENT TO MAKE WILL: *Taylor v. Kelly*, 68 Am. Dec. 159; nor mere eccentricity, however great: Collected cases in note to *Addington v. Wilson*, 61 Id. 84; and the influence of legitimate family and social relations is not such an influence upon a testator as will invalidate his testamentary disposition of his property, unless it is exerted over the very act of devising, so as to prevent the will from being truly the act of the testator: *Dean v. Negley*, 80 Id. 620.

AWARD OF COSTS IS IN DISCRETION OF COURT IN ALL SUITS IN CHANCERY which are determined by the court on a final hearing: *Blue v. Blue*, 87 Am. Dec. 267; *Pearce v. Chastain*, 46 Id. 423; *Cowles v. Whitman*, 25 Id. 60; extended note to *Saunders v. Frost*, 16 Id. 405-407, on costs in equity.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The right of a testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust: *Jackson v. Jack-*

son, 39 N. Y. 157; *Tyler v. Gardiner*, 35 Id. 615; *Brick v. Brick*, 66 Id. 155; *Walt v. Breeze*, 18 Hun, 404; *Seguine v. Seguine*, 4 Abb. App. 194; S. C., 35 How. Pr. 339; 3 Keyes, 665; *McLaughlin's Will*, 2 Redf. 514; *Phillips v. Chater*, 1 Dem. 535; *Potter v. McAlpine*, 3 Id. 115; *In the Matter etc. of Will of Jackson*, 26 Wis. 116. If delusion exists upon one subject, he is as to that of unsound mind, although in regard to other subjects he may reason and act like a rational man: *Riggs v. American Tract Society*, 95 N. Y. 512. A change of testamentary intention of itself furnishes no ground for setting aside a will: *Hogan v. Yates*, 1 Dem. 597. To invalidate a will, it must be proved that it was procured by force, threats, or coercion destroying free agency. The exercise of the influence springing from the family relation, or from considerations of service, affection, or gratitude, is not undue, even though it be pressed to the extent of unreasonable importunity: *Harvard v. Harvard*, 2 Hun, 446; S. C., 5 Thomp. & C. 81; and it is a general rule that the provisions of a will of themselves are not evidence of undue influence or mental incapacity, whatever the terms may be: *Tyler v. Gardiner*, 35 N. Y. 613; *Deas v. Wandel*, 3 Thomp. & C. 129; *Phillips v. Chater*, 1 Dem. 535; *Rutherford v. Morris*, 77 Ill. 414. Undue influence cannot be presumed or inferred from opportunity or interest, but must be proved to have been exercised, and exercised in relation to the will itself, and not merely to other transactions: *Tyler v. Gardiner*, 35 N. Y. 610; *Bicknell v. Bicknell*, 2 Thomp. & C. 103; *Seguine v. Seguine*, 4 Abb. App. 198; S. C., 35 How. Pr. 343; 3 Keyes, 669. As to what influence is deemed sufficient to invalidate the testamentary act of one upon whom it is practiced, see collected cases in *Cornwell v. Riker*, 2 Dem. 383. With the exception of attesting witnesses, non-professional witnesses cannot express an opinion on the general question of sanity, but they may be examined as to matters within their own observation bearing upon the competency of the testator, and they may characterize as in their opinion rational or irrational the acts and declarations to which they testify: *Howell v. Taylor*, 11 Hun, 217; *Bell v. McMaster*, 29 Id. 273; *Real v. People*, 55 Barb. 576; S. C., 8 Abb. Pr., N. S., 321; 42 N. Y. 282; *O'Brien v. People*, 3 Abb. Pr., N. S., 375; S. C., 36 N. Y. 282; *Higbee v. Guardian Mut. Life Ins. Co.*, 66 Barb. 466; *Hewlett v. Wood*, 55 N. Y. 636; *Goodell v. Harrington*, 3 Thomp. & C. 347; *In the Matter etc. of Ross*, 87 N. Y. 520; *Holcomb v. Holcomb*, 95 Id. 321, 322; *People v. Conroy*, 97 Id. 67; *Yanke v. State*, 51 Wis. 469, 470. On the other hand, however, the subscribing witness to a will may speak as to the sanity of the testator at the time the will was executed: *Hewlett v. Wood*, 55 N. Y. 635; *Holcomb v. Holcomb*, 95 Id. 321; *Bell v. McMaster*, 29 Hun, 273. It is a rule, on review of decrees of surrogates, which are in the nature of a rehearing in equity, not to reverse the decree on the ground of the admission of evidence technically improper, if the facts established by legal and competent evidence are sufficient to uphold it: *Harper v. Harper*, 1 Thomp. & C. 360; *Brick v. Brick*, 66 N. Y. 156; *Rollwagen v. Rollwagen*, 63 Id. 522; *Foot v. Beecher*, 78 Id. 158; S. C., 12 Hun, 375; 7 Abb. N. C. 362, 366; *La Ban v. Vanderbilt*, 3 Redf. 403; *Patterson v. Copeland*, 52 How. Pr. 466; *Horn v. Pullman*, 10 Hun, 473; *Holcomb v. Holcomb*, 20 Id. 158; *Johnson v. Hicks*, 1 Lana. 157; *In Matter etc. of Jackson*, 26 Wis. 110. While the court in *Foot v. Beecher*, 78 N. Y. 158, S. C., 7 Abb. N. C. 366, 12 Hun, 375, admitted this rule to be correct on an appeal from a surrogate's decree upon the probate of a will, because in such cases the hearing is *de novo* in the appellate courts, it was held that there is no distinction between legal and equitable actions, or between actions tried by a jury or a court in respect to the availability of exceptions taken upon

the trial upon admission of incompetent evidence; and that in any case, an error in receiving such evidence, if properly excepted to, can only be disregarded when it can be seen that it could do no harm. This case involved the incompetency of the declarations of a mortgagor, since deceased, and was distinguished from the principal case. The award of special issues is a matter of practice resting in the discretion of the court: *Clarke v. Brooks*, 1 Abb. App. 359; S. C., 2 Abb. Pr., N. S., 407. On appeal from the decrees of surrogates, the supreme court exercises a power in the nature of an equitable review; and on appeals of this character, the whole case is to be examined by the appellate court, as well upon the facts as upon the law, so far as those questions are presented by the appeal: *Johnson v. Hicks*, 1 Lans. 157; *Gilman v. Gilman*, 3 Hun, 25; S. C., 5 Thomp. & C. 676; *Ross v. Ross*, 6 Id. 86; *In Matter etc. of Jackman*, 26 Wis. 110; *Marvin v. Marvin*, 4 Keyes, 21; S. C., 3 Abb. App. 202. The case last cited was distinguished, however, from the principal one. The principal case was summarised as to the fifth point of the syllabus, *supra*, in *Merrill v. Rolston*, 5 Redf. 252; *McLaughlin's Will*, 2 Id. 514; and cited in a sort of general way in *Burnham v. Mitchell*, 34 Wis. 134, 137, as to what constitutes evidence of insanity.

MAGEE v. BADGER AND POTTER.

[34 NEW YORK, 247.]

PERSON IS TO BE DEEMED BONA FIDE HOLDER OF COMMERCIAL PAPER where he purchased it for full value before maturity without notice of any equities between the original parties, or of any defect of title.

PURCHASER OF COMMERCIAL PAPER FOR FULL VALUE BEFORE MATURITY IS NOT BOUND at his peril to be upon the alert for circumstances which might possibly excite the suspicions of wary vigilance. He does not owe to the party who puts negotiable paper afloat the duty of active inquiry to avert the imputation of bad faith.

RIGHTS OF HOLDER WHO HAS PURCHASED COMMERCIAL PAPER FOR FULL VALUE BEFORE MATURITY ARE TO BE DETERMINED by the simple test of honesty and good faith, and not by a speculative issue as to diligence or negligence.

IT IS NOT ERROR TO REFUSE TO GIVE NUMEROUS PROPOSITIONS IN GROSS AS CHARGE TO JURY where some of them are plainly erroneous; and under an exception to such refusal, the question as to whether the remaining propositions were correct is one which the appellate court will not consider.

ACTION against the defendants as maker and indorser of a promissory note for \$350, payable six months after date. Illegality of consideration was pleaded as a defense; also that the plaintiff was not a *bona fide* holder. Verdict for plaintiff, and the judgment was affirmed on appeal: See *Magee v. Badger and Potter*, 30 Barb. 246. The note in suit was given to one Davis in settlement of a suit brought by him on a previous note against Badger, which was not indorsed by Potter; and the note thus given in settlement was transferred by Davis to the plain-

tiff for value before maturity. The first note was given to the Buffalo, Corning, and New York Railroad Company, of which defendant Badger was a stockholder. Badger gave the note for the purpose of preferring nine shares of his stock, under the provisions of chapter 146 of the Laws of 1854. That note was for three hundred dollars, payable in one year, and was transferred to Davis, who was secretary of the company, in part payment of his salary, and was charged to him on the books of the company. Davis brought a suit on that note against Badger, which suit was settled by giving the note in question. Badger surrendered eighty-seven shares of old stock, and received from Davis, as secretary, under the arrangement, ninety shares of the preferred stock. When this new stock was issued the company was insolvent, and its effects had passed into the hands of a receiver. The note in suit was purchased from Davis by the plaintiff about three months after it was given, and he indorsed the amount on a note of four hundred dollars which he held against Davis, and surrendered an accepted draft which he held as collateral security for the payment of the four-hundred-dollar note. It was found that the plaintiff had no notice of the consideration of the note, and knew nothing of the issuance of the preferred stock, or of the arrangement thereof between the maker and the payee. Other facts are stated in the opinion.

George B. Bradley, for the appellants.

David Rumsey, for the respondent.

By Court, PORTER, J. At the close of the evidence, nine propositions were submitted to the judge, and an exception was taken to his refusal to adopt them in gross in his charge to the jury. The refusal was right, as several of them were plainly erroneous. The question whether the remaining propositions were correct is one we are not at liberty to consider under a mere general exception applicable in common to all: *Hunt v. Maybee*, 7 N. Y. 266, 273; *Elton v. Markham*, 20 Barb. 343; *Haggart v. Morgan*, 5 N. Y. 422, 427 [55 Am. Dec. 350]; *Magie v. Baker*, 14 Id. 437.

There was no error prejudicial to the defendants in the instructions of the judge to the jury. He charged, at the request of the appellant, that the note in suit was invalid as between the original parties, and on this assumption the question whether the previous note was good or void was plainly immaterial. The fact that the plaintiff purchased

the note in question for value before maturity was proved and undisputed. The instructions under which the judge submitted to the jury the issue as to the good faith of the plaintiff in making the purchase were more liberal to the defendants than they were entitled to ask. He charged in substance that the plaintiff was not a *bona fide* holder if he had notice either of the facts which invalidated the note or of circumstances of suspicion which upon due inquiry might have led him to a knowledge of those facts. The instruction was not warranted by the evidence, and was based on a misconception of the existing rule of law. One who purchases commercial paper for full value before maturity, without notice of any equities between the original parties or of any defect of title, is to be deemed a *bona fide* holder. He is not bound at his peril to be upon the alert for circumstances which might possibly excite the suspicions of wary vigilance; he does not owe to the party who puts negotiable paper afloat the duty of active inquiry to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence.

The authority mainly relied on in support of the opposite theory is the case of *Gill v. Cubitt*, reoprted in 3 Barn. & C. 466. The doctrine of that case has been repeatedly overruled as well in the English as in the American courts, and it cannot be recognized as authority without an innovation on our system of commercial law fraught with infinite mischief and uncertainty: *Crook v. Jadis*, 5 Barn. & Adol. 909; *Backhouse v. Harrison*, 5 Id. 1098; *Goodman v. Harvey*, 4 Ad. & E. 870; *Raphael v. Bank of England*, 17 Com. B. 161; *Steinhart v. Boker*, 34 Barb. 436; *Goodman v. Simonds*, 20 How. 343; *Bank of Pittsburgh v. Neal*, 22 Id. 96; *Murray v. Lardner*, 2 Wall. 110.

The error, however, was against the respondent, and neither party was prejudiced, as the jury, under instructions so favorable to the defendant, found that the plaintiff received the note in good faith.

The judgment should be affirmed.

CAMPBELL, J., rendered the following concurring opinion: The act of April 1, 1864, which was an act to increase the capital stock of the Buffalo, Corning, and New York Railroad Company by the issuing and sale of a certain number of shares of preferred stock, provided and declared that no such stock should be issued until the provisions of the act should be accepted by a

vote representing at least two thirds of the stock of the company, at a stockholders' meeting, or until the written assent of the holders of two thirds of the stock should be obtained. By the terms of the act, the holders of the stock existing at the time of the passage were allowed to subscribe for one share of the new preferred stock for every three shares of the old stock held by them; and on paying the par value of such share of new stock, the other three shares of old stock might be converted also into new preferred stock. It is at once seen that if the act should be accepted by those owning two thirds of the stock, and the directors of the company should cause the new preferred stock to be issued, it might be very desirable for the holders to convert their old stock, or a portion thereof, into such new stock. In that event, they could make their subscriptions; and at the same time, by section 2 of the act, the directors could not demand immediate payment. The language of that part of section 2 is: "Provided that more than one half of the amount of such new stock so taken by each stockholder shall be required to be paid in by him within three months, and the remaining half may be required to be paid within six months after the acceptance of this act by the stockholders." This provision was for the benefit of the old stockholders; and it is difficult to see why, if the company should give further and additional time to any or all such stockholders, that thereby the subscription would be illegal and invalid. When Badger, who was a holder and owner of old stock, subscribed for three shares of the new stock, with a view of preferring nine shares of old stock, and gave on making such subscription his note payable in twelve months, and the company accepted it payable at such time, — thus, in his case, giving him a longer time for payment than the act required, — he made in my judgment a perfectly valid and binding contract. True, he never got his stock, because he never paid his note, but on the contrary refused to pay it when it became due. But the note was valid in the hands of the company, being given on his subscription. The payment for the new stock was to be made "in such manner as the board of directors of the said company shall direct at the time of subscribing." They had directed that Badger should pay for his stock at the end of twelve months, and should give his note therefor.

It seems to me very clear that this was a legal and valid note in the hands of the company, and was so in the hands of Davis, who owned it, and caused suit to be brought to enforce its collection. The note in controversy was given on the settlement of that suit, and, embracing interest, was simply and virtually a renewal of that first note. It might be added in this connection, that the settlement of that suit formed a good consideration for the present note, even if there were doubts as to the validity of the first note. But in my opinion, the first note was perfectly good, and therefore the second note was given for a full and perfect consideration, and good in the hands of Davis, to whom it was given. But it is said that the second note was rendered illegal, even if the first was good, because the secretary converted into preferred stock a much larger proportion of Badger's old stock than he was entitled to by his original subscription, and that this illegal act formed a part of the consideration of the new note. But this was not so. If the first note was a legal and valid note, then Badger was indebted on it dollar for dollar of the new note, and Davis got no more than he was legally entitled to receive, and which was justly his due. The suggestion as to the issue of the excess of preferred stock seems to have come from Bergen. The stock at that time, it seems, was worthless. If Davis was inclined to issue this worthless stock in order to get his debt secured, while the act may not be com-

mendable, it is difficult to see how it could destroy a good and valid claim then subsisting.

Upon the admitted and uncontradicted facts of this case, and without considering the exceptions, it seems to me very clear that this judgment must be affirmed. Judgment affirmed.

AS TO FIRST THREE POINTS OF SYLLABUS, SUPRA, see *Davis v. Bartlett*, 80 Am. Dec. 375, note 386; *Beall v. Leverett*, 79 Id. 298; *Emanuel v. White*, 69 Id. 385; *Pettee v. Prout*, 63 Id. 778; *Way v. Richardson*, 63 Id. 760; *Russell v. Hadduck*, 44 Id. 693; *Stalker v. McDonald*, 40 Id. 389; *Kimbro v. Lytle*, 31 Id. 585, note 589; *Ridgway v. Farmers' Bank*, 14 Id. 681; particularly the extended note to *Bay v. Coddington*, 9 Id. 272, 273, on *bona fide* holders, who are; extended note to *Sims v. Lyles*, 26 Id. 158-159, on right of *bona fide* holder to recover on negotiable instrument. Inquiry must be made where there are suspicious circumstances connected with the note, or the assignee thereof will be affected with notice: Note to *Russell v. Hadduck*, 44 Id. 699; *Snyder v. Riley*, 47 Id. 452. Holder need not show that he came by note fairly unless suspicions are raised: Note to *Morgan v. Yarrowborough*, 33 Id. 552; *Mala fides* in the holder must be shown before possession will be inquired into: Extended note to *Ayer v. Hutchins*, 3 Id. 235; *Ellicott v. Martin*, 61 Id. 327; collected cases in note thereto 330; *Kunkel v. Spooner*, 66 Id. 352; and suspicious circumstances alone do not show *mala fides*: See note to *Ayer v. Hutchins*, 3 Id. 235. Indorser is not bound to show how he acquired possession of a note when it is secured to him by mortgage: *Squier v. Stockton*, 52 Id. 583.

IF CHARGE ASKED EMBRACES SEVERAL DIFFERENT PROPOSITIONS, part of which is good, and a part bad, the court may refuse the whole: *Inglebright v. Hammond*, 53 Am. Dec. 430; *Whiteford v. Burckmyer*, 39 Id. 640, note 657; *Andre v. State*, 68 Id. 708; exceptions to charge of court should point out the specific portions of the charge excepted to: *Hicks v. Coleman*, 85 Id. 103.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: A holder of commercial paper is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance. He does not owe to the party who puts negotiable paper afloat the duty of active inquiry to avert the imputation of bad faith: *Colson v. Arnot*, 57 N. Y. 270, dissenting opinion; *Belmont Branch Bank v. Hoge*, 35 Id. 68; *Comstock v. Hannah*, 76 Ill. 535; *Parker v. Conner*, 93 Id. 127; *Farmers' etc. Bank v. Noxon*, 45 Id. 765; *Mabie v. Johnson*, 8 Hun, 310; *Head v. Smith*, 44 How. Pr. 478. The rights of the holder are to be determined by the simple tests of honesty and good faith, and not by a speculative issue as to his diligence or negligence: *Colson v. Arnot*, 57 N. Y. 270; *Belmont Branch Bank v. Hoge*, 35 Id. 68; *Lord v. Wilkinson*, 56 Barb. 595; *Spiller v. James*, 32 Ind. 206; *Comstock v. Hannah*, 76 Ill. 535; *Parker v. Conner*, 93 N. Y. 127. Possession is plenary evidence of title until other evidence is produced to control it: *Smith v. Sac County*, 11 Wall. 158. Circumstances sufficient to put purchaser on inquiry will not alone deprive him of the character of a *bona fide* holder: *Parker v. Conner*, 93 N. Y. 127. It is not sufficient that a prudent man would be put upon inquiry, nor that the purchaser was negligent; nor that he did not exercise a proper degree of caution. Thus a purchaser of negotiable bonds for value will be protected if he is honest and believes that the seller has a good title: *Dutchess Co. Mut. Ins. Co. v. Hachfeld*, 73 Id. 228. One who for full value obtains from the apparent owner a transfer of negotiable paper before it matures, and who has no notice of any equities between the original parties, or of any defect in the title of the presumptive

owner, is to be deemed a *bona fide* holder: *Belmont Branch Bank v. Hoge*, 35 Id. 68; *Lindley v. Diefsendorf*, 43 How. Pr., N. S., 359. To constitute a person a *bona fide* purchaser of a negotiable instrument, he must have received the instrument upon some new consideration advanced at the time, or must have relinquished some security for a pre-existing debt due him: *Lawrence v. Clark*, 36 N. Y. 130. If a stolen note is purchased, knowledge of the robbery at the date of the purchase is essential to bad faith; and the fact that published notice of the robbery was given before the purchase is not conclusive on the purchaser. Even if he had seen the notice, and afterward bought the note, having forgotten about the notice, and not recognizing the note as stolen, it would be a question for the jury to decide whether the defendant purchased the note *bona fide*: *Lord v. Wilkinson*, 56 Barb. 597. The principal case was approved in *Lindley v. Diefsendorf*, 43 How. Pr. 359. Some cases in England and in this country have held that the holder's title is defective unless he exercises due caution. He must not have acquired the paper under circumstances which ought to have excited the suspicion of an ordinarily prudent and careful man. This doctrine is now wholly exploded in England. Negligence, or even gross negligence, is not sufficient to impeach the holder's title. It has been well remarked that "reasonable caution" is difficult to define, and presents a dangerous question to leave to a jury. The present English view, that the holder's title can only be impeached by evidence of bad faith, is maintained in this country by a great preponderance of authority: *Colson v. Arnot*, 57 N. Y. 270, dissenting opinion; *Belmont Branch Bank v. Hoge*, 35 Id. 68; *Lord v. Wilkinson*, 56 Barb. 595; *Johnson v. Way*, 27 Ohio St. 379, 380; *Comstock v. Hannah*, 76 Ill. 534, 535, and collected cases therein cited, including the principal one. And the New York cases are claimed to be in harmony with the adjudications of the supreme court of the United States on this subject: *Seybel v. National Currency Bank*, 54 N. Y. 302. An exception to a refusal to adopt in gross a series of propositions in the form of a request to charge is unavailing if any of the propositions are erroneous: *Waleh v. Kelly*, 40 Id. 558; *Sum etc. Ass'n v. Tribune Ass'n*, 12 Jones & S. 139. Exceptions must be specific, and present the very point intended to be raised; and each point objected to should be the subject of a specific ruling by the judge, and of a specific exception by the party: *Waleh v. Kelly*, 40 N. Y. 558; *Ayrault v. Pacific Bank*, 47 Id. 576; *Banta v. Martin*, 38 Ohio St. 536.

RYAN AND NEVINS v. DOX.

[34 NEW YORK, 307.]

EQUITY WILL AT ALL TIMES LEND ITS AID TO DEFEAT FRAUD, notwithstanding the statute of frauds.

PART PERFORMANCE OF PAROL AGREEMENT IS SUFFICIENT TO TAKE CASE OUT OF statute of frauds.

POSSESSION DELIVERED IN PURSUANCE OF PAROL AGREEMENT IS SUCH DEGREE OF PERFORMANCE as to take contract out of statute of frauds.

COURTS OF EQUITY WILL ENFORCE SPECIFIC PERFORMANCE OF CONTRACT within the statute of frauds, where a parol agreement has been partly carried into execution.

PAROL EVIDENCE IS ADMISSIBLE IN EQUITY TO SHOW THAT DEED ABSOLUTE ON ITS FACE WAS in fact a mortgage, and so intended by the parties thereto.

COURTS WILL NOT PERMIT STATUTE OF FRAUDS TO BE PERVERTED INTO INSTRUMENT OF FRAUD. They will not allow the medium of fraud to be interposed to prevent an agreement from being put into writing; so where the statute plainly declares an agreement void if not reduced to writing, the defendant will not be permitted to avail himself of the statute if his fraud contributed to prevent the agreement from being put into writing.

PURCHASER BUYING FOR OWNER IS TRUSTEE. If property is about to be sold under legal proceedings, and one agrees to purchase for the owner's benefit, and by artifice prevents others from bidding at the sale by declaring that he was to buy for the owner, whereby the property was sold at a great sacrifice, he will, if he afterwards endeavors to keep the property himself, be declared a trustee for the person defrauded.

WHERE ONE PARTY TO CONTRACT VOID BY STATUTE OF FRAUDS AVAILS HIMSELF OF ITS INVALIDITY, and unconscientiously appropriates what he has acquired under it, equity will compel restitution; and it constitutes no objection to the claim that the defrauded party may happen to secure the same practical benefit through the process of restitution which would have resulted to the other party from the observance of the void agreement.

TRUSTEE EX MALEFICIO OF LAND SOLD UNDER MORTGAGE FORECLOSURE. —

If one makes a parol agreement to buy at a foreclosure sale for the mortgagor, and prevents others from bidding by declaring such to be his purpose, and thus acquires the title at a price greatly below its value, and he afterwards attempts to claim the property for his own benefit after leaving the mortgagor in possession for several years, the law makes him a trustee *ex maleficio*, and equity, notwithstanding the statute of frauds, will treat him as a trustee for the owner, and on tender to him of the purchase-money and interest, he will be compelled to convey the property to the party equitably entitled to it.

THE facts are stated in the opinion.

Henry R. Selden, for the appellants.

Alexander S. Johnson, for the respondent.

By Court, DAVIES, C. J. This action was tried by a referee, who held as matter of law that unless the agreement set out in the complaint in relation to the purchase by the defendant at the master's sale of the premises in question, or some note or memorandum thereof expressing the consideration, be in writing, the same was void, and created no interest in the plaintiffs in said premises, and could not be enforced against said defendant in law or equity. And he further reported as matter of fact that no proof was made or offered on said trial by or in behalf the plaintiff of any such agreement in writing, or of any note or memorandum in writing of such an agreement, or of any deed, conveyance, or instrument in writing subscribed by the defendant or his lawful agent, creating or declaring any trust or interest in said premises in favor of

said plaintiffs, and that no proof was made or testimony or evidence offered on the part of the defendant. The judgment entered for the defendant upon the report of the referee was affirmed at the general term, and the plaintiffs now appeal to this court.

We are at liberty to assume from this finding that the agreement set out in the complaint was proven on the trial before the referee. To ascertain what that agreement was, we must have reference to the complaint and the offer made by the plaintiffs on the trial. The plaintiffs averred in the complaint that the plaintiff Michael Ryan, being seised of certain lands in the town of Seneca, made and executed a mortgage thereon in the year 1839 to secure the sum of eight hundred dollars, part of the purchase-money thereof, and that in the month of October, 1841, said plaintiff Ryan conveyed to the said Nevins, the other plaintiff, an equal undivided half of the said premises; that plaintiffs being unable to pay the installments on said mortgage as they became due, the said mortgage was foreclosed, and said plaintiffs procured of one Lewis the sum of three hundred dollars, which was paid on account of said judgment of foreclosure, and a portion thereof, to the extent of three hundred dollars, was assigned to said Lewis as his security for such advance; that said Lewis becoming importunate for his money, and the plaintiffs being unable to raise the same for him, Lewis proceeded to advertise said premises for sale on the twelfth day of October, 1843, for the purpose of raising said sum of about three hundred dollars, while said premises were worth the sum of four thousand dollars. The complaint further averred that while said premises were thus advertised for sale, and before the day of sale had arrived, the plaintiffs, being men of limited means, and unable to raise the money which would be needed to stop the said sale, and to pay up the amount due on the said decree for the debt and the costs which had accrued, applied to the defendant, Dox, reported to be a man of ready money, and who had always professed to be interested in their behalf, and asked him to assist them and aid them to raise the money to pay the amount due on said decree, and save the said premises from being sold away from them, and from being sacrificed for the small amount, compared with their value, which was claimed upon said decree. That said Dox did then profess and declare a willingness to help said plaintiffs for such purpose, and did then and there agree with the said plaintiffs

that on the day of said sale he, the said Dox, would attend the same and bid off and purchase the said premises at such sale, upon the express agreement and understanding between the plaintiffs and said Dox that such bidding and purchase, if made by the said Dox, should be for the benefit and advantage of these plaintiffs; and the plaintiffs upon such agreement and understanding agreed that they would not find any other one to go their friend at the said sale, and to bid in and purchase the said premises for them; and that it was expressly understood and agreed between the plaintiffs and said Dox that if he became the purchaser of said premises at said sale he should take the deed of the same from the said master in his own name, but only by way of and as security to himself for what money he should have to advance and pay on such purchase, and with the agreement, promise, and undertaking between said Dox and these plaintiffs that whenever these plaintiffs should repay him the amount which he should pay to procure and effect such purchase and to get the deed therefor, with the interest thereon, and a reasonable compensation for his services therein, he, the said Dox, should convey the said premises to these plaintiffs, and again vest the title thereto in them, and should in the mean time hold the said premises in his own name as security only for the said moneys, and always subject to the above agreement and defeasance. That in pursuance of said agreement said Dox attended said sale, and bid off the same for the sum of one hundred dollars, he being the only bidder at said sale, and the same was struck off to him, and he received the deed therefor. That at said sale it was talked about and understood by those present thereat that said Dox was bidding for the benefit of these plaintiffs, and that said premises were struck off to him only as security to him for the repayment to him by these plaintiffs of the moneys he should advance and pay for the same, and interest thereon, and his reasonable charges for his attention thereto. And the plaintiffs averred that such was the fact, and that in truth said Dox did bid off and purchase the said premises for these plaintiffs, and to save the same for them, and took the deed in his own name only as such security as aforesaid, and that in consequence of such understanding other persons abstained from bidding on said premises, and the same was struck off to said Dox without any opposing bid, although the plaintiffs averred that the same were then worth four thousand dollars and upwards. And the plaintiffs also

averred that if they had not relied upon said agreement, promise, and undertaking of said Dox, they would not have allowed the said premises to have been struck off for the said sum of one hundred dollars, but could have found other persons to have purchased the said premises, and saved the same from sacrifice, but that as said agreement was made more than a month before said sale, these plaintiffs relied upon it, and made no other effort to procure the money, nor the assistance of friends to save and buy said premises.

That at the time of said sale, these plaintiffs were in the possession of said premises, and continued in possession thereof, and made payments on account of the encumbrances thereon, until some time in the year 1849, with the knowledge, privity, and consent of said Dox. And that during all that time said Dox never exercised any acts of ownership over said premises, nor interfered with the ownership, use, occupation, or possession thereof by the plaintiffs; and that during all that time the assessments and taxes thereon were paid by the plaintiffs, with the knowledge, privity, and assent of said Dox. That in the year 1849 the said plaintiffs were induced by said Dox to surrender the possession of said premises to him, and in the year 1851 he refused to come to a settlement with the plaintiffs, and denied that he held the said premises for their benefit, or that they had any interest therein. The referee included said evidence, and decided that he would not receive any parol evidence to establish or tending to establish the said agreement, and that upon the case made by the pleadings, assuming there was no agreement in writing as stated in the answer, there can be no recovery by the plaintiffs. To this decision and ruling the plaintiffs duly excepted.

This exception presents the main question for consideration and decision upon this appeal, and the referee in his report states the ground or reason of his decision to be, that unless the agreement mentioned, or some note or memorandum thereof expressing the consideration, be in writing, the same was void, and could not be enforced against the defendant. If the referee was right in this conclusion, then the plaintiffs were properly nonsuited, and the judgment for the defendant should be affirmed. If in error, then it follows that there must be a reversal and a new trial.

The Revised Statutes declare that no estate or interest in lands, nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted, or

declared unless by act or operation of law, or by a deed of conveyance in writing, subscribed by the party creating, granting, or declaring the same: 1 R. S. 134, sec. 6. It is manifest that the referee had this provision before him, and that his decision was based upon the assumption of its applicability to the case in hand. In arriving at this conclusion, he entirely ignored all consideration of fraud or of part performance as elements of the transaction. Section 10 of the same title declares that "nothing in this title contained shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance of such agreements": 1 Id. 135, sec. 10. It is well settled that courts of equity will enforce a specific performance of a contract within the statute when the parol agreement has been partly carried into execution: 2 Story's Eq. Jur., sec. 759. And the distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be enabled to practice a fraud upon the other, and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statutes are promoted, instead of being obstructed, by such a jurisdiction for discovery and relief. And when one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that if the latter should refuse it would be a fraud upon the former to suffer his refusal to work to his prejudice.

In Fonblanque's Equity it is said: "If the contract be carried into execution by one of the parties, as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part; for when there is a performance, the evidence of the bargain does not lie merely upon the words, but the facts performed, and it is unconscionable that the party that received the advantage should be admitted to say that such contract was never made": Fonb. Eq., b. 1, c. 3, sec. 8, p. 181. And the universal rule is correctly enunciated by Browne on Frauds when he says: "The correct view appears to be that equity will at all times lend its aid to defeat a fraud, notwithstanding the statute of frauds": Browne on the Statute of Frauds, sec. 438.

In the present case, we are to assume that the agreement was made as set out in the complaint, and performed on the part of the plaintiffs as therein stated. We, then, have a dis-

inct and unequivocal agreement established, and performance by one party of all that was to be done in pursuance of it on his part. We find the other party, by reason of the acts and omissions of this party, obtaining the possession and title to a large amount of real estate for a trifling sum compared to its actual value, and refusing to fulfill the agreement on his part. He interposes the statute of frauds as a shield, thus using a statute designed to prevent frauds as an instrument whereby one can be perpetrated with impunity. This a court of equity cannot tolerate.

Wetmore v. White, 2 Caines Cas. 87 [2 Am. Dec. 323], was an action brought in chancery to compel the specific performance of a contract by parol relating to lands. The chancellor dismissed the bill, but the court of errors unanimously reversed his decree. Thompson, J., in delivering the opinion of the court, says: "The appellant's claim resting altogether upon parol contract, it becomes necessary to examine whether any obstacle to relief is interposed by the statute for the prevention of fraud. I think there is not. It is an established rule in equity that a parol agreement in part performed is not within the provisions of the statute (citing 1 Fonb. Eq. 182, and cases there noted). To allow a statute having for its object the prevention of frauds to be interposed in bar of the performance of a parol agreement in part performed would evidently encourage the mischief the legislature intended to prevent. . . . Possession delivered in pursuance of an agreement is such a degree of performance as to take a contract out of the statute." The same doctrine was reaffirmed in *Parkhurst v. Van Cortland*, 14 Johns. 15, 35, 36 [7 Am. Dec. 427].

In *Lowry v. Tew*, 3 Barb. Ch. 407, 413, the chancellor said: "The principle upon which courts of equity hold that a part performance of a parol agreement is sufficient to take a case out of the statute of frauds is, that a party who has permitted another to perform acts on the faith of an agreement shall not be allowed to insist that the agreement is invalid because it was not in writing, and that he is entitled to treat those acts as if the agreement in compliance with which they were performed had not been made; in other words, upon the ground of fraud in refusing to execute the parol agreement after a part performance thereof by the other party, and when he cannot be placed in the same situation that he was before such part performance by him." See also *Phillips v. Thompson*, 1 Johns. Ch. 131; *Murray v. Jayne*, 8 Barb. 612.

In *Hodges v. Tennessee Marine Fire Ins. Co.*, 8 N. Y. 416, this court held that in equity parol evidence was admissible to show that a deed absolute on its face was in fact a mortgage, and so intended by the parties thereto. And in *Despard v. Walbridge*, 15 Id. 374, this court also held that an assignment of a lease absolute on its face was in fact made for the purpose of securing a debt, and that such debt had been fully paid; and that under the code of procedure, parol evidence is admissible to show that such assignment, though absolute in its terms, was intended as a mortgage.

The case of *Brown v. Lynch*, 1 Paige, 147, is so like to that now under consideration that it may be profitable to refer to it at length. A mortgage upon a farm was foreclosed in chancery, and advertised for sale by a master. Before the sale, Brown, the defendant, made an arrangement with the plaintiffs, the Lynches, whereby he agreed to purchase the farm in for their benefit, for which he was to receive a stipulated compensation. The mortgagee, in order to favor the Lynches, agreed with Brown that he might bid off the property for about half the amount of the mortgage. Brown, at the sale, prevented others bidding by representing that he intended to buy for the Lynches, and he purchased the farm at the master's sale for fifteen hundred dollars, about one thousand dollars below its value. Afterwards, Brown refused to convey the farm to the Lynches, or to account to them for the value, although they tendered to him the amount of his bid with interest, and the sum agreed for his services. And it was held by the court of chancery that Brown was a trustee for the Lynches, and had no other interest in the farm than that of mortgagee to secure the repayment of the purchase-money, and of the payment of the sum agreed to be allowed him for his services; and that the court of chancery would relieve against a fraud, by converting the person guilty of it into a trustee for those who have been injured thereby. Emott, vice-chancellor, decreed for the plaintiffs, holding the defendant had committed a fraud upon the plaintiffs by agreeing to purchase for their benefit, when in truth he meant to purchase for himself, and that he had committed a fraud upon the plaintiffs by his acts and representations in preventing bidding at the sale. And he proceeds to show by the citation of numerous authorities that a court of equity can provide adequate relief by declaring the purchaser a trustee for the person defrauded. And he quotes with approbation the re-

marks of Lord Eldon in *Mestaer v. Gillespie*, 11 Ves. 626, where he says: "Upon the statute of frauds, though declaring that interest shall not be barred except by writing, cases in this court are perfectly familiar, deciding that a fraudulent use shall not be made of that statute; when this court has interfered against a party meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud, even though the statute has declared that, in case these circumstances do not exist, the instrument shall be absolutely void." The chancellor affirmed the decree, and observed that the Lynches had an interest in the premises which they had a right to protect and preserve, and it would have been a gross fraud for any one to hold out to them under such circumstances that he was bidding off the property for their benefit, when he in fact intended to appropriate it to his own use. If the appellant did in fact bid it off for them, under the agreement he held it in trust for them, and had no other interest in it than that of a mortgagee to secure the repayment of the purchase-money and the sixty dollars agreed to be paid him for his trouble. But if he had no such intention, and did not in fact bid off the property in trust for them, he was guilty of a fraud which the court will relieve against. The cases referred to by the circuit judge (vice-chancellor), fully establish the principle that this court has power to relieve against such fraud, and the means to be employed is to convert the person who has gained an advantage by means of his fraudulent act into a trustee for those who have been injured thereby. This case was cited with approbation in *Anderson v. Lemore*, 8 N. Y. 239, and the principle of it adopted by this court in that case.

Its principle was also adopted and approved of in *Sandford v. Norris*, decided at a special term of supreme court in May, 1859, and affirmed at general term in the first district in June, 1861 (4 Abb. App. 144). In that case, certain premises were owned by the plaintiff's husband, and he made an assignment thereof, and his assignees advertised the same for sale. The plaintiff was anxious to purchase them in at the sale, and made an arrangement with the defendant, Morris, by which he agreed to attend the sale and bid them off in his name for the plaintiff, and on payment of the sum, to convey the same to the plaintiff. In consequence of this arrangement, the plaintiff refrained from bidding at the sale, and the premises were stricken off to the defendant for the sum of twenty dollars, subject to the prior encumbrances. The defendant

subsequently sold the premises so purchased for the sum of two thousand dollars, of which the plaintiff had received one half, and the action was brought to recover the residue. It was held that the plaintiff was entitled to recover, and that the defense of the statute of frauds interposed by the defendant was no bar to the relief sought by the plaintiff; that the agreement was established beyond controversy, and the defendant was bound as well by sound morals as established principles of law to the performance of it. On the hearing of that case, the opinion of Mr. Justice Emott in the case of *Bergen v. Nelson* (not reported), was read, distinctly affirming the doctrine of *Brown v. Lynch, supra*. The case of *Osborn v. Mason* (not reported), before the vice-chancellor of the first circuit, also affirming the doctrine of that case, was also cited. Mason in that case agreed with Osborn to attend a sale of certain premises, Osborn being either owner or a subsequent encumbrancer, Mason also having a claim upon the premises as an encumbrancer. Mason agreed to bid in the premises at the sale, and then to let Osborn have them for the amount at which they stood him in, including his own encumbrance. Mason bid off the premises, and then refused to fulfill his agreement, which was by parol. The vice-chancellor held that the statute of frauds was no bar to the suit for a specific performance of the agreement, which was decreed, and on appeal to the chancellor, the same was affirmed.

Voorhies v. St. John, was argued and decided in this court in December, 1863. It was an action brought to recover moneys received by the defendant on a sale of a house and lot in the city of New York, and a leasehold estate in two buildings on other lots therein, and for an account of the rents and profits received therefrom. The property had formerly belonged to the husband of the plaintiff, and consisted of three parcels, and upon a sale thereof by his assignees, the plaintiff requested two of her friends to attend the sale and bid off two of said parcels for her benefit. They subsequently, at her request, transferred their bids to the defendant, St. John, and he took the conveyance therefor to himself, and paid the assignee for the same, declaring at the time that the plaintiff wished him to buy that property for her. At the sale of the other parcel, St. John attended the assignee's sale, and bid off the same himself; and the assignments of the two bids, and the titles to all the three pieces of property, made out to him together, in his own name. All these acts were done by St.

John for Mrs. Voorhies, at her request and for her benefit. The referee reported in favor of the plaintiff, and the judgment thereon was affirmed at the general term of the first district on the authority of *Sandford v. Norris*, *supra*. On appeal to this court, that judgment was affirmed in December, 1863, and distinctly on the ground that the statute of frauds was no bar to the performance of the agreement. We must hold this case as decisive of that now under consideration.

The same doctrine has frequently been affirmed in other cases. In *Cox v. Cox*, 5 Rich. Eq. 365, the owner of land, in danger of being summarily dispossessed by a sheriff's sale, agreed with his brother, the defendant, that the latter should bid off the land and pay the bid, and make a reconveyance on repayment. This agreement was declared to the by-standers at the sale, and competition being thus prevented, the land was bought by the brother for one tenth of its actual value. The whole transaction was alleged to be "a fraudulent contrivance on the part of the defendant to obtain his brother's land for one tenth of its value." The court enjoined the defendant from proceeding at law under the title thus fraudulently obtained, saying: "This court has often repeated that the statute of frauds should never be perverted to an instrument of fraud. Thus in a case of an agreement such as the statute plainly declares void if not reduced to writing, yet if this was omitted by fraud the defendant would not be permitted to avail himself of the statute." In *Whitechurch v. Bevis*, 2 Brown Ch. 565, Lord Thurlow says: "If you interpose the medium of fraud, by which the agreement is prevented from being put in writing, I agree the statute is inapplicable": See *Keith v. Purvis*, 4 Desaus. Eq. 114.

In the case cited of *Keith v. Purvis*, *supra*, a creditor induced his debtor's agent not to bid at a sale of his debtor's land by promising to give the debtor time to pay the debt, and then to reconvey the land. This agreement was disclosed at the sale, and prevented other bids, whereby the creditor bought the land at one third of its value, but afterwards refusing to reconvey, the debtor brought his bill for relief. To this it was objected that the agreement was void by the statute of frauds; but the court held "that if the agreement was void, the creditor must surrender up his advantage under it, and be liable to make good the loss sustained by the adverse party from his conduct." "Can it be tolerated," says the court at page 221, "that a creditor shall, at a sale of his debtor's property, lull

him to sleep and keep off other purchasers by an agreement under which he buys in the land for a small sum, much below the value, and then that he should declare that the agreement was void under the statute of frauds, and that the other party should have no benefit from the agreement, whilst he reaped all the fruits? Surely not. Courts of justice would be blind indeed if they could permit such a state of things."

In *Peebles v. Reading*, 8 Serg. & R. 492, the supreme court of Pennsylvania said: "If by the artifice of the purchaser, declaring he was to buy for the owner, others were prevented from bidding, and the land was sold at a great undervalue, this would make him a trustee." And in *Trapnall v. Brown*, 19 Ark. 49, property of the value of \$5,000 was, by agreement similar to the one in the present case, bought in for \$176, other persons declining to bid on being informed of the object of the agreement. "Under these circumstances," the court said, "we think it would be a fraud in the purchaser to keep the property in violation of the agreement; that the statute, which was designed to prevent fraud, would be used as a shield, and in the commission of fraud, which the courts of equity will not tolerate. We think, therefore, that the court below did not err in treating the purchaser as a trustee."

These observations made in these cases are as pertinent to that now under consideration as they were in them. Many of these cases are identical in all important particulars with this, and there is no good reason why the same rules of law and morals enunciated in them should not govern and control the decision in this case. The fact that an agreement is void under the statute of frauds does not entitle either party to relief in equity, but other facts may; and when they do, it is no answer to the claim for relief that the void agreement was one of the instrumentalities through which the fraud was effected: *Ormond v. Anderson*, 2 Ball & B. 369. Where one of the parties to a contract void by the statute of frauds avails himself of its invalidity, but unconscientiously appropriates what he has acquired under it, equity will compel restitution; and it constitutes no objection to the claim that the opposite party may happen to secure the same practical benefit through the process of restitution which would have resulted from the observance of the void agreement: *Floyd v. Buckland*, 2 Freem. Ch. 268; *Oldham v. Litchford*, 2 Id. 284; *Devenish v. Baines*, Finch, 3; *Thynn v. Thynn*, 1 Vern. 296; *Reech v. Kennygate*, 1

Ves. Sr. 125; *Davis v. Walsh*, 2 Har. & J. 329; *Wilcox v. Morris*, 1 Murph. 116 [3 Am. Dec. 678]; *Stoddard v. Hart*, 23 N. Y. 560.

It is very clear to my mind, both upon principle and authority, that the referee erred in excluding the evidence offered, and that the judgment must be reversed and a new trial ordered, with costs to abide the event

Judgment reversed and new trial awarded.

HUNT, J., dissented.

PART PERFORMANCE OF PAROL AGREEMENT AS TAKING CASE OUT OF STATUTE OF FRAUDS: See *McKown v. McDonald*, 82 Am. Dec. 576, note 580; *Sweeney v. Moore*, 74 Id. 134; *Maddox v. Rowe*, 68 Id. 535, and collected cases in note thereto 537. That a parol agreement by one person to purchase land and convey it to another whenever advances are repaid is void under the statute of frauds, see *Myers v. Byerly*, 84 Id. 497.

POSSESSION DELIVERED IN PURSUANCE OF AND IN PART PERFORMANCE OF PAROL AGREEMENT CONCERNING LAND, WHETHER TAKES CASE OUT OF STATUTE OF FRAUDS: See note to *Myers v. Byerly*, 84 Am. Dec. 499; *Workman v. Guthrie*, 72 Id. 654, note 664; *Wentworth v. Wentworth*, 72 Id. 97.

COURTS OF EQUITY WILL DECREE SPECIFIC PERFORMANCE OF CONTRACT WITHIN STATUTE OF FRAUDS, where a parol agreement has been partly executed: *Wentworth v. Wentworth*, 72 Am. Dec. 97; *Johnson v. Hubbell*, 66 Id. 773; *Young v. Daniels*, 63 Id. 477, note 486.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT DEED ABSOLUTE IS MORTGAGE: *Swart v. Service*, 34 Am. Dec. 211, note 213; *Moore v. Madden*, 46 Id. 298; *Fowler v. Stoneum*, 62 Id. 490, note 506; *Johnson v. Sherman*, 76 Id. 481, note 488; *Auding v. Davis*, 77 Id. 658, note 668.

AS TO SIXTH POINT IN SYLLABUS, SUPRA, see extended note to *Bow v. Stamford*, 51 Am. Dec. 145. The statute of frauds was not intended to facilitate fraud, but to prevent its perpetration: *Maddox v. Rowe*, 68 Id. 535; and trusts and frauds are not within the statute of frauds: See note to *Johnson v. Hubbell*, 66 Id. 783.

PERSONS ACQUIRING TITLE BY FRAUD ARE TRUSTEES for the injured party: *Coleman v. Cocke*, 18 Am. Dec. 757; so where it has been acquired under a promise that it shall be wholly or in part held for another: See note to *Thompson's Lessee v. White*, 1 Id. 257, 258.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: A court of equity will not permit the statute of frauds, which was designed to prevent frauds, to be used as an instrument for perpetrating a fraud with impunity: *Sherman v. Scott*, 27 Hun, 333; S. C., 2 Civ. Proc. 369; *Bitter v. Jones*, 28 Id. 494; *Morrill v. Cooper*, 65 Barb. 519; nor will it allow the statute to be invoked by a party as a shield to protect himself in the perpetration of a fraud: *Levy v. Brush*, 45 N. Y. 596; *Carpenter v. Otley*, 2 Lana. 457; *Wood v. Mulock*, 16 Jones & S. 87. A party will not be permitted to insist upon the statute of frauds to protect himself in the enjoyment of advantages procured from another in faith of the oral agreement on which the latter has acted, and in faith thereof has placed himself in a situation in which he must suffer wrong and injustice: *Dodge v. Well-*

man, 43 How. Pr. 431; S. C., 1 Abb. App. 518. Thus a parol agreement to exchange lands will be enforced in equity, notwithstanding the statute of frauds, where one of the parties has conveyed but the other one refuses: *Baker v. Scott*, 2 Thomp. & C. 607. Equity will at times lend its aid to defeat a fraud, notwithstanding the statute of frauds: *Sandford v. Norris*, 4 Abb. App. 146, 147; *Robbins v. Robbins*, 89 N. Y. 257; *Wood v. Rabee*, 96 Id. 427. Thus where a person verbally agrees with another to purchase land for the latter's benefit, and advances the price and takes a conveyance in his own name, he cannot interpose the statute of frauds to defeat the claim of the other to enforce the trust arising from the transaction: *Sandford v. Norris*, 4 Abb. App. 144, and cases there cited; *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 357. Equity will not permit a party to retain property obtained on the faith of a verbal contract to consummate a fraud by retaining the property and refusing to perform the contract: *Levy v. Brush*, 45 Id. 597; *Moyer v. Moyer*, 21 Hun, 72. A party, however, in no legal sense commits a fraud by refusing to perform a contract void by its provisions. He has not in that case made a contract, and has a perfect right both at law and in equity to refuse performance: *Levy v. Brush*, *supra*; but no case can be found where a contract has been taken out of the statute in favor of a party who had no existing interest in the property, who had done no act of part performance, who had parted with nothing under the contract, simply upon the ground that the other party was guilty of a fraud in refusing to perform his verbal agreement: Id. 596; *Wood v. Mulock*, 16 Jones & S. 87. However, when a contract void because not in writing has been so far performed that it would be a fraud upon the party or operate as a great hardship upon him unless carried out, it will be enforced notwithstanding the statute: *Hobbs v. Wetherwax*, 38 How. Pr. 390. A parol agreement in part performed is not within the statute of frauds: *Wood v. Fleet*, 36 N. Y. 511; and equity will decree a specific performance of it: *Hensler v. Seftin*, 19 Hun, 568; *Levy v. Brush*, 45 N. Y. 596, 597; *Moyer v. Moyer*, 21 Hun, 72; *Sherman v. Scott*, 27 Id. 333; S. C., 2 Civ. Proc. 369. Parol evidence is admissible to show the purpose for which a written instrument is executed, and to establish a trust: *Copperly v. Copperly*, 4 Thomp. & C. 345; *Morris v. Budlong*, 78 N. Y. 553. Whenever property is transferred, no matter in what form or by what conveyance, as a security for a debt, the transferee takes merely as a mortgagee, and has no other rights or remedies than the law accords to mortgagees. Especially is this so where one has loaned another money and bid in the latter's land at a judicial sale to hold as security for the repayment of the money: *Carr v. Carr*, 52 Id. 260; S. C., 4 Lans. 326; *Levy v. Brush*, 45 Id. 596; *Umfreville v. Keeler*, 1 Thomp. & C. 489; *Bowery National Bank v. Duncan*, 12 Hun, 408; *Beatty v. Brummett*, 94 Ind. 79. To attempt to hold the property under such circumstances as upon an absolute grant divested of all equity of redemption is "too gross a fraud to be permitted": *Carr v. Carr*, 52 N. Y. 259. The payment of money under many circumstances raises a trust by implication. It arises to prevent fraudulent practices by persons acting in a fiduciary or confidential relation, and such persons, when the payment has been made to them, are transformed into trustees *ex maleficio* by operation of law so that they may be reached in equity. This is in cases of fraud. And for the same purpose, courts of equity will take the trust which parties have attempted to create by parol agreement and enforce it. In such a case, the fraud, not the parol agreement, gives the jurisdiction: *Moyer v. Moyer*, 21 Hun, 72; *Foot v. Bryant*, 47 N. Y. 550; *Penman v. Slocum*, 41 Id. 50; *Wheeler v. Reynolds*, 66 Id. 236; *Bauman v. Holshausen*, 26 Hun, 507. As

to case not within statute of frauds, see *Cornell v. Utica etc. R. R. Co.*, 61 How. Pr. 192. The principal case was relied on in *Valentine v. Heydecker*, 12 Hun, 678; recognized and approved in *Church v. Kidd*, 3 Id. 265; S. C., 5 Thomp. & C. 460; *Marie v. Garrison*, 13 Abb. N. C. 285; referred to in *Fiedler v. Darrin*, 59 Barb. 663, on the point that the interest and compensation for his trouble allowed Dox in the principal case was not disallowed as usurious or regarded as objectionable; quoted from in *Madison Ave. Church v. Oliver St. Church*, 9 Jones & S. 386, as to restitution where one has unconscientiously appropriated to himself what he has acquired by availing himself of the invalidity of a contract void by the statute of frauds; commented upon in *Marie v. Garrison*, 13 Abb. N. C. 284-286; *Wood v. Mulock*, 16 Jones & S. 87; summarized in *Wheeler v. Reynolds*, 66 N. Y. 232; *Tomlinson v. Miller*, 3 Keyes, 518, 519; and distinguished in *Wheeler v. Reynolds*, *supra*.

STOCKWELL v. PHELPS.

[34 NEW YORK, 368.]

IF PARTY IN POSSESSION OF LAND, CLAIMING ADVERSELY TO ALL OTHERS, SELLS HAY cut therefrom during such occupancy to a third party, the legal title thereto passes to his vendee as against a party having a title in fee-simple in said premises, but not in possession.

REPLEVIN IN CREDIT CAN ONLY BE BROUGHT WHEN TRESPASS COULD BE MAINTAINED, and that will lie for an injury to land only when the plaintiff is in possession.

REFeree's FINDING ON QUESTION OF FACT MAY BE REVIEWED in the supreme court of New York, but it is conclusive in the court of appeals.

ACTION to recover about three tons of hay claimed to be the property of the plaintiffs. Defendant's answer denied that plaintiffs owned the hay. The facts are stated in the opinion. The referee directed a judgment in favor of the defendant for a return of the property or the value thereof. Plaintiffs appealed to the general term of the supreme court, where the judgment was affirmed, and the plaintiffs appealed to this court.

B. L. Bessac, for the appellants.

J. H. Reynolds, for the respondent.

By Court, **WRIGHT, J.** The land from which the hay in controversy was cut was at the time of the cutting in the actual possession of one Owen Wild, he claiming the premises as his own, and holding them adversely to the plaintiffs, who had the title in fee. While thus in actual possession, holding adversely to the plaintiffs, Wild sold and delivered the hay to the defendant, whereupon the plaintiffs brought replevin for

the same. The referee held that the plaintiffs could not recover for the hay, and gave judgment for the defendant.

The judgment was right. Wild, when the action was commenced, was in the actual possession of the premises from which the hay in question was cut, claiming them as his own, adversely to the plaintiffs; and whatever right the plaintiffs might have had to maintain an action after obtaining possession of the premises, it is clear they had no right of action whatever when this one was commenced. Replevin, or an action in the nature of replevin in the *cepit*, can only be brought when trespass could be maintained, and that will only lie for an injury to land when the plaintiff is in possession: *Rich v. Baker*, 3 Denio, 79; *De Mott v. Hagerman*, 8 Cow. 220; and Wild being in the actual possession of the premises, claiming them as his own, is regarded as the owner as to all the world until after a judicial decision. The remedy of the plaintiffs was a judgment against Wild for mesne profits, in an action of ejectment, or by action of trespass after having gotten possession of the land.

It may be that the referee merely found as to the character of the possession of Wild at the time the hay was cut, and by him sold and delivered to the defendant. But that was a question of fact, and his finding is conclusive in this court that it was adverse to the plaintiffs. It is not our province to reverse questions of fact, but to take the facts as found by the original tribunal.

The judgment should be affirmed.

PECKHAM, J. Upon the facts found by the referee, there can be very little doubt as to the correctness of the judgment. The plaintiffs insist that under the evidence Wild never could have held the farm adversely; that he was estopped from any such holding; that he was there as tenant at will, or at sufferance, of the plaintiffs; and then they insist that the evidence showed no adverse possession. Neither of these questions is here for review, as neither seems to have been made before the referee. No objection seems to have been taken to evidence showing or tending to show an adverse possession; no point presented to the referee that the evidence given was legally insufficient to prove it.

The weight of the evidence cannot be here examined on an allegation that the referee erred as to a finding of fact; that was exclusively for the supreme court. The simple question

to case not within statute of frauds, see *Cornell* against one who has How. Pr. 192. The principal case was relief on of a farm, claiming 12 Hun, 678; recognized and approved in *Johnson* on of a farm, claiming 5 Thomp. & C. 480; *Marie v. Garrison* holding it adversely, — *Fiedler v. Darrin*, 59 Barb. 663, on the point the plaintiffs have recovered tion for his trouble allowed Dox think it is well settled that the usurious or regarded as object

v. *Oliver St. Church*, 9 Jones

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supra.

in entering upon the land, the action, but not for after acts until he This applies, I think, under the au- 16 Jones & S. 87. *Holmes v. Seely*, 4 Cow. 509, and cases cited; *Dewey v. Osborn*, 4 Cow. 509, and cases cited; *Hagerman*, 8 Id. 220. The possession

here alluded to is something more than a mere act of trespass.

It must be so long continued, and so far yielded to, as to con-

stitute a possession to the exclusion of others, — an occupancy,

as distinguished from a mere act of trespass.

The plaintiffs insist that the possession of the defendant in

the case at bar was a tenancy at will, or at sufferance of the

plaintiffs. If that were so, it does not necessarily follow that

this action would lie. Suppose the tenant at will remains in

possession for six months or for a year, gets in and gathers

the crops, for what is he liable to the owner? For the use and

occupation of the premises, not for the value of the crops; nor

do the crops of grain or grass, as a general rule, belong to the

owner of the land under such circumstances. But if the ten-

ant commit waste on the land, — if he cut down trees without

authority, and contrary to his agreement as tenant, either ex-

press or implied, remove them from the premises and sell

them, trover will lie against him by the owner: *People v. Al-*

berty, 11 Wend. 160. And if the trees after being cut lie

a while, and are then removed and sold, trespass will lie, — a

nice distinction: *Schermerhorn v. Buell*, 4 Denio, 422.

Whether a vendor remaining in possession after having sold

and delivered a deed of the premises can hold adversely to

his vendor, it is not necessary to decide. But there are au-

thorities looking in that direction: *Jackson v. Benton*, 1 Wend.

341; *Zeller v. Eckert*, 4 How. 289.

Judgment affirmed.

REFLEVIN DOES NOT LIE FOR CROPS OR TIMBER ON LANDS HELD AD-

VERSELY: *Anderson v. Hapler*, 85 Am. Dec. 318, and extended note 322.

TRESPASS OR TROVER DOES NOT LIE WHILE LANDS ARE HELD ADVERSELY:

Anderson v. Hapler, 85 Am. Dec. 318, and extended note thereto, on remedy

- injuries to real estate held adversely to plaintiff, 321-327; *Gent v. Lynch*, Id. 558, note 562.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and point stated: A wife and minor children were in possession of and carried on a farm for their own use, the husband and father being in a distant part of the country. On August 28, 1854, the wife agreed to sell certain harvested crops for one hundred dollars, and took a note for the amount, a part of which was paid by the purchaser. On September 24th, the sheriff levied on the crops so sold, but still on the premises, and sold the same to satisfy judgments against the husband; and it was held that the title to the property in question was in the wife, that her sale was a valid sale, that the property was not liable for the debts of the husband, and that the sheriff was a trespasser: *Van Ellen v. Currier*, 3 Keyes, 381; S. C., 4 Abb. App. 478. Title to land in possession of another gives no right to crops raised thereon; the owner is entitled only to the mesne profits: *Id.* The very fact that he may recover the rents and profits of the land shows that he cannot recover the crops: *Page v. Fowler*, 39 Cal. 416, 417. The principal case was misquoted in *Booth v. Spryten etc. Mill Co.*, 60 N. Y. 498; and distinguished in *Samson v. Ross*, 65 Id. 419, as there was no adverse holding in that case.

ROBINSON v. CHAMBERLAIN.

[84 NEW YORK, 289.]

LAW PRESUMES THAT OFFICE IS CREATED FOR BENEFIT OF PUBLIC.

EVERY PUBLIC OFFICER WHOSE DUTIES ARE NOT JUDICIAL IS LIABLE TO INDIVIDUAL who sustains special damage from the negligent performance of such officer's duties, or his omission to perform them.

CONTRACTOR INVESTED WITH POWERS OF NON-JUDICIAL OFFICER IS LIABLE TO ONE who sustains special damage by such contractor's neglect of duty.

FAILURE TO KEEP PUBLIC HIGHWAY IN REPAIR MAKES PARTY BOUND TO REPAIR LIABLE to an action at the suit of any one who sustains special damage from want of such repair.

CANAL IS PUBLIC HIGHWAY, AND IF CONTRACTOR EMPLOYED BY STATE TO KEEP IT in proper condition and repair neglects his duty, whereby an individual sustains special damage, he is liable to an action at the suit of the party injured.

ACTION against a contractor employed by the state to keep a portion of the canals in proper condition and repair. The defendant entered lock No. 30, on the first section of the Chenango canal, with his boat, but the lock-gates, being old, rotten, and insufficient, gave way, and caused great injury to the plaintiff's boat and furniture. Plaintiff alleged that the defendant had previous notice of the condition of the gates. By the statutes of New York, the board of canal commissioners was authorized to let the repairs upon any or all of the sections of the canals of that state to be made by contract; and

here is, Can this action be maintained against one who has purchased the hay of a party in possession of a farm, claiming it as his own against the world, and holding it adversely,—the action being brought before the plaintiffs have recovered possession of the farm? I think it is well settled that the action cannot be sustained.

For the first act of trespass in entering upon the land, the owner may maintain an action, but not for after acts until he first regain possession. This applies, I think, under the authorities, to all cases of ouster of the owner: *Holmes v. Seely*, 19 Wend. 507, 509, and cases cited; *Dewey v. Osborn*, 4 Cow. 329, 338; *De Mott v. Hagerman*, 8 Id. 220. The possession here alluded to is something more than a mere act of trespass. It must be so long continued, and so far yielded to, as to constitute a possession to the exclusion of others,—an occupancy, as distinguished from a mere act of trespass.

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ROBINSON v. CHAMBERLAIN.

[34 NEW YORK, 289.]

LAW PRESUMES THAT OFFICE IS CREATED FOR BENEFIT OF PUBLIC.

EVERY PUBLIC OFFICER WHOSE DUTIES ARE NOT JUDICIAL IS LIABLE TO INDIVIDUAL who sustains special damage from the negligent performance of such officer's duties, or his omission to perform them.

CONTRACTOR INVESTED WITH POWERS OF NON-JUDICIAL OFFICER IS LIABLE TO ONE who sustains special damage by such contractor's neglect of duty.

FAILURE TO KEEP PUBLIC HIGHWAY IN REPAIR MAKES PARTY BOUND TO REPAIR LIABLE to an action at the suit of any one who sustains special damage from want of such repair.

CANAL IS PUBLIC HIGHWAY, AND IF CONTRACTOR EMPLOYED BY STATE TO KEEP IT in proper condition and repair neglects his duty, whereby an individual sustains special damage, he is liable to an action at the suit of the party injured.

ACTION against a contractor employed by the state to keep a portion of the canals in proper condition and repair. The defendant entered lock No. 30, on the first section of the Chenango canal, with his boat, but the lock-gates, being old, rotten and insufficient, gave way, and caused great injury to the plaintiff's boat and furniture. Plaintiff alleged that the defendant had previous notice of the condition of the gates. By the statutes of New York, the board of canal commissioners was authorized to let the repairs upon any or all of the canals of that state to be made by con-

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[24 NEW YORK, 389.]

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the contractor was invested with the same general powers formerly given to superintendents of repairs, and the same general duties were imposed upon him. The plaintiff was nonsuited at the circuit, the general term reversed the judgment, and defendant appealed to this court, stipulating that judgment final might be awarded against him in case he was unsuccessful in his appeal.

Daniel S. Dickinson, for the appellant.

Hotchkiss and Seymour, for the respondent.

By Court, PECKHAM, J. The only question in this case is, whether an action will lie against a contractor employed by the state, pursuant to law, to keep a portion of the canals in proper condition and repair, who neglects his duty, whereby the plaintiff sustains special damage.

It is a familiar doctrine that "when a corporation or individual is bound to repair a public highway or navigable river, they are liable to indictment for the neglect of their duty": *Per Nelson, J., in People v. Albany*, 11 Wend. 539 [27 Am. Dec. 95]. A navigable river is a public highway; our canals, open and free to all for navigation upon payment of the toll fixed by law, as our turnpikes are for travel upon like terms, are, I think, in every sense public highways. A failure to keep a public highway in repair by those who have assumed that duty from the state, so that it is unsafe to travel over, is a public nuisance, making the party bound to repair liable to indictment for the nuisance, and to an action at the suit of any one who has sustained special damage. There is no decision in our courts at war with these principles: *Lansing v. Smith*, 8 Cow. 151; *Smith v. Wright*, 24 Barb. 306; *Pierce v. Dart*, 7 Cow. 609; *Shepherd v. Lincoln*, 17 Wend. 250; 3 Chitty on the Criminal Law, Perkins's ed. of 1841, 568; *Adsit v. Brady*, 4 Hill, 630 [40 Am. Dec. 305]; *Mayor of Lyme Regis v. Henley*, 1 Bing. N. C. 222.

If there be exceptions to this general rule as to the liability of one bound to repair, I think it rests with him who claims their existence to prove them. I am not aware of any distinction as to such liability, whether the obligation to repair arises from prescription, *ratione tenuræ*, by act of Parliament, or otherwise.

In England, at common law, the general charge of repairing all highways is on the parishes through which they pass

3 Chitty on the Criminal Law, 566. But the duty may be devolved upon others. In this state, generally, commissioners of highways in towns are bound to the repair of highways, and it has been generally supposed that they were liable to an action when it was through their fault that the road was out of repair, and a party had thereby sustained special damage, though I admit that no action has yet been successful that I am aware of, for the reason that it has never yet been shown that the road was out of repair, and the damage occurred by their default, though actions based upon the assumption of their liability have not been uncommon. One of the justices of this court, in an able opinion, has lately denied the liability of commissioners of highways to a private action under any circumstances; but the case was not disposed of upon that ground; only two judges agreed with him to place the decision on that ground: *Garlinghouse v. Jacobs*, 29 N. Y. 297. Nice distinctions have been made as to such liability.

In *Adsit v. Brady*, 4 Hill, 632 [40 Am. Dec. 305], the broad rule is laid down that "when an individual sustains an injury by the misfeasance or non-feasance of a public officer, who acts or omits to act contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case." This is a healthful rule, sound entirely in public policy, if as a rule of law it can be questioned. As a rule of law, as there applied, it has stood for nearly a quarter of a century, and I think should continue.

In *Weet v. Village of Brockport*, 16 N. Y. 168, note, Mr. Justice Selden denies this doctrine so far as it applies to public officers, insisting that the only remedy against them is by indictment, because they are officers. Being officers, "their contract is treated as made with the defendant alone, while that of the individual is deemed to be made with and to inure to the benefit of every person interested in its performance." The portion of the opinion in the last case referring to *Adsit v. Brady*, *supra*, was unnecessary to the decision of that case. The defendants in *Weet v. Village of Brockport*, *supra*, were held liable for the special damage sustained, both for non-feasance and malfeasance, the judge basing their liability upon their contract, express and implied, contained in their accepted charter. In *Fish v. Dodge*, 38 Barb. 163, the supreme court decided directly against the last case, holding that an officer is liable for misfeasance or malfeasance whereby a party sustains special damage, but that an individual con-

tractor is not; and this was founded upon a prior decision in the eighth district to the same effect.

In my judgment, the decisions, irrespective of the reasons therefor, in *Adsit v. Brady*, *supra*, and in *West v. Village of Brockport*, *supra*, are both right, and should be sustained. The latter decides this case. But I cannot concur in the reasoning of the learned judge in the latter case, which makes distinctions where there is no real difference in principle. The principle he derives from the English authorities, and in which he concurs, is, "that whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases, the contract made with the sovereign is deemed to inure to the benefit of every individual interested in its performance": *Fish v. Dodge*, *supra*. But, he says, except in cases of sheriffs, clerks, etc., who receive a compensation from private parties, "the contract of the officer is treated as made with the government alone. The reason for the distinction appears to be that intimated by Gould, J., in *Lane v. Cotton*, 1 Ld. Raym. 646, that the duties in the one case are imposed upon the officer for public purposes only, while in the other they are voluntarily assumed with a view to private advantage."

Is not the contract, when there is no officer, "made with the government alone" in every case cited? Certainly. But in the case of contract by government with a contractor, not with an officer, "it is deemed to inure to the benefit of every individual interested in its performance." And why does not the contract with the officer "inure to the benefit of every individual interested in its performance"? If Mr. Justice Gould did assign the reason in *Lane v. Cotton* above stated (though I cannot find it as reported in 1 Ld. Raym. 646, on careful reading), it may have been well in 1701, when that case was decided; but now, in this age, I think I am safe in saying that offices in general are accepted because the incumbents suppose their worldly condition will thereby be improved pecuniarily, socially, or otherwise. As to the voluntary assumption by contract, or the imposition of certain duties upon an officer, does any one accept an office in this country involuntarily?

In truth, it seems to me there is no sound distinction whatever in the two cases. And in *Lane v. Cotton*, *supra*, which was an action against the postmaster-general, for the miscarriage of a package, which seems to have been lost by the negligence of an inferior officer, responsible to the crown, not a mere clerk, Holt, C. J., dissented from the judgment for defendant, and Mr. Justice Powys held that an action lay against the subaltern Breese, whose negligence caused the loss, hence the plaintiff was not without remedy; and that by the express words of the patent, the defendant was not answerable "for the default of the inferior officers."

The same doctrine was afterwards held in *Whitfield v. Lord Le Despenser*, Cowp. 754, that the postmaster was not liable for a theft in the office committed by one of the clerks who gave security to the crown. But Lord Mansfield, in giving the opinion of the court there, said: "As to an action on the case lying against the party really offending, there can be no doubt of it. If the man who receives a penny to carry the letters to the post-office loses any of them, he is answerable; so is the sorter in the business of his department; so is the postmaster for any business of his own." To the same effect is the language of Chief Justice Best, who said: "Now, I take it to be perfectly clear that if a public officer abuses his office either by an act of omission or commission, and the consequence is an injury to an individual, an action lies against such officer. The instances of this are so numerous that it would be a waste of time to refer to them": *Henley v. Mayor of Lyme Regis*, 5 Bing. 91. But I did not intend to cite authorities to support *Adsit v. Brady*, *supra*. These are the authorities referred to to impeach that case.

The same principle that gives relief against a contractor with the government gives the like relief against an officer of government. An officer really contracts with the government faithfully to discharge the duties of his office, and he usually adds an oath to that effect. He voluntarily assumes the duties. The public, the individuals thereof, usually are more especially interested in the proper discharge of the duties than the government itself. The principle on which the action is based in each case against an officer or contractor with the government is a broad principle of public policy essential to the public welfare. The law presumes that an office is created for the benefit of the public.

It is admitted that sheriffs, clerks, etc., are responsible to

individuals for malfeasance or non-feasance, because, it is said, they receive specific compensation from the individuals for the specific service, and hence there may be said to be a contract for its proper performance. In fact, there is no more a contract in such case than if the clerk or sheriff were paid a salary, and either he received no fees or received them for the state or county. In both cases he acts under the law, which makes it his duty to render those services, in one case on certain prescribed terms, and in the other unconditionally.

Suppose a county clerk received a salary and was entitled to no fees. A party presents to him a record to file in his office, and to docket a judgment. He persistently refuses to do his duty by filing it, whereby the amount of a judgment is lost; a farm on which it would have been a lien is in the mean time sold and conveyed to a *bona fide* purchaser. I think there can be no doubt as to the liability of the clerk, though he received and was entitled to no fees; he violated his duty as an officer, to the party's damage. How poor a compensation to him to say that the clerk may possibly be removed or indicted! Does that pay him for his loss? In fact, he is left without remedy. In the case at bar, according to the reasoning in *Weet v. Village of Brockport, supra*, the defendant is clearly liable, because his contract with the government "inures to the benefit of every one interested in its performance"; but if the defendant had assumed the same duties as superintendent, — as an officer, — he would have been under no liability to those whom his non-feasance or his malfeasance would generally most injure, viz., the navigator of the canal. Yet each is employed by the same power, — the government, — and according to law paid by the same, and their duties are substantially the same, the only difference being in the mode of their appointment or employment. In one case, the man who will agree, and give security therefor, to do the repairs at the lowest rate is appointed or employed, according to the statute. In the other, the one who secures the preference of a majority of the canal board is appointed, and gives security. Each agrees to do his duty; the contractor in writing, the officer by implication and by his oath. Upon every principle of sound reason, their liability to persons injured by their negligence should be the same.

Garlinghouse v. Jacobs, 29 N. Y. 297, is not in conflict in the decision, and may be distinguished in the reasoning of the judge from this case. Mr. Justice Wright there insisted that

commissioners of highways were in no case liable to a private action, because there is not that precision and certainty of duty that should make them responsible in a civil action for an omission to perform it; of themselves they are not supplied by law with the means nor with power to obtain them "to make them discharge the duty under all circumstances." That "it will not do to say that they are thus liable when they happen accidentally to have funds at command to make repairs, and omit to make them, and are not liable when without them": *Id.* 309. It is not pretended that either of these objections has any force in the case at bar. The duty here was specific and clear, the means of the defendant ample; or if not ample, it was his own fault, of which he cannot take advantage.

But it is not perceived why the commissioners of highways should not be held liable for a neglect of duty when they have ample funds in their hands, and the injury to an individual occurs from their wrongful omission to use them, though they may not always have such funds. In other words, I do not see why, because a man cannot be convicted when he is innocent, that he should not be condemned when he is guilty.

Reason and public policy alike exempt judicial action from liability in order to secure the perfect independence of the judiciary, and for other controlling reasons. Exclusive of judicial action, every officer in the land, in my judgment, is responsible for a violation of his official duty, to him who sustains special damage thereby,—a sound, healthful rule, imparting life and efficiency to officers and security to the public. Upon principle as well as under the authority of this court as declared in *West v. Village of Brockport*, *supra*, this defendant is liable. Having received a consideration from the sovereign power for performing a public duty, he is liable for a neglect to discharge that duty to the plaintiff, who has thereby sustained special damage.

The judgment should be affirmed.

HUNT, J. The complaint alleges that the defendant was a contractor with the canal commissioners to keep in repair the first section of the Chenango canal during the year 1856; that in September of that year the plaintiff was navigating the canal with his boat, the *B. F. Adams*, and entered lock No. 30 on the section in question; that the lock-gates were old, rotten, and insufficient, and gave way, causing great injury to

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Reverend A. Chamberlain.
the plaintiff's feet and furniture, and that the defendant had
previous notice of the condition of the gates. The complaint
further alleges that the defendant had charge, direction, and
control of the said section of the canal, and that it was his
duty to keep the same, including the locks, in good repair
and in navigable condition.
At the circuit, the plaintiff was nonsuited upon his opening.
The general term reversed the decision of the judge at circuit.
The defendant appeals to this court, stipulating that judg-
ment final may be awarded against him in case he be unsuc-
cessful in his appeal.

The present case has been twice elaborately argued in this
court, and similar cases have been twice carefully presented
at the general terms of the supreme court.

The proposition is claimed to be well settled that when a
franchise is conferred by the sovereign power upon a corpora-
tion or individual, in consideration of which certain duties are
required to be performed, such corporation or individual is
liable in a civil action to a party sustaining an injury pecu-
liar to himself from neglect of performance. To this are cited
numerous cases, the most prominent of which is that of *Mayor*
of Lyme Regis v. Henley, 1 Bing. N. C. 232; 3 Barn. & Adol.
77. It is claimed, on the other hand, that Chamberlain was
simply a party to a contract with the canal commissioners,
by which he undertook to keep certain locks in repair, and
that if he failed in the performance of his contract, he is liable
to the other party only, and that strangers to the contract
have no claim upon him for its breach. Many authorities are
cited to this proposition, the general principle of which is not
disputed.

Prior to the passage of the statutes of 1854, 1855, and 1857,
hereafter to be mentioned, the repairs upon the canals of this
state were made by officers, appointed by the canal board,
called superintendents of repairs. These officers were re-
quired to execute bonds for the faithful performance of their
trusts, and it was their duty, under the direction of the canal
commissioners, to keep in repair the sections of the canal and
locks connected therewith committed to their charge, to make
all necessary contracts for that purpose, and faithfully to ex-
pend the moneys intrusted to them by the canal commis-
sioners: 1 R. S. 236. The same statute (p. 250) provided
that all suits for penalties and forfeitures, or for damages in
behalf of the state, should be prosecuted in the name of the

people of the state, by such persons as the commissioners of the canal fund in their regulations should direct, and that the moneys received should be paid over to such commissioners. It was thereby also provided in numerous cases for injuries to the canals and their structures that the suits should be brought in the name of such superintendent.

In *Adsit v. Brady*, 4 Hill, 630 [40 Am. Dec. 305], it was held that this superintendent, under the statute cited, was a public officer; that he had the care and control of the canals, subject only to the general direction of the canal commissioners; that it was his duty, without waiting for orders from the commissioners, to repair a breach in the canal, or to remove obstructions from it; that having left a rock remaining in the canal, after notice of its presence, by which the plaintiff's boat and cargo were injured, he was responsible in an action to recover damages for such injury. The same principle was announced in the case of *Shepherd v. Lincoln*, 17 Wend. 250, where the superintendent was engaged in repairing a bridge, and his workmen left it so insufficiently guarded at night that the plaintiff and his horse and wagon fell through the bridge and were seriously injured. The defendant was adjudged to be responsible for the damages. Both of these cases were determined by the late supreme court, the opinion in the first case being given by Bronson, J., and in the last by Cowen, J., and are authority in this court. The superintendent was condemned on the ground that he was a public officer, and that he had neglected his duty.

What constituted him a public officer? or upon what principle was it claimed that he held a public office? An office is defined to be "that function by virtue whereof a man hath some employment in the affairs of another, as of the king or of another person": Cowell; 2 Tomlins's Law Dict., tit. Office. "And every man is a public officer who hath any duty concerning the public; and he is not the less a public officer where his authority is confined to narrow limits; because it is the duty of the office, and the nature of the duty, which makes him a public officer, and not the extent of his authority": Id.; and *King v. Burnell*, Carth. 479. This principle was applied to commissioners to lay out a road (*People v. Hayes*, 7 How. Pr. 248), who were held to be public officers. It was decided by the late chancellor, and by the late court of errors, that attorneys and counselors at law were public officers, and held a public trust and office, within the meaning of the constitu-

tion: *Seymour v. Ellison*, 2 Cow. 28, 29, and note; *Wood's Case*, Hopk. Ch. 7, before the chancellor.

Commissioners appointed by the governor under a statute to superintend the construction of a building are officers within section 16, article 4, of the constitution, which provides that where the duration of an office is not prescribed by the constitution, it may be declared by law; and when not so declared, shall be during the pleasure of the appointing power: *People v. Comptroller*, 20 Wend. 595. The keeper of the Albany county penitentiary is a public officer within section 124 of the code, which enacts that actions against public officers for acts done by virtue of their office shall be brought in particular counties: *Porter v. Pilsbury*, 11 How. Pr. 240. A collector of a village tax, appointed by the trustees of the village, is held to be a public officer within the statute providing for the punishment of official delinquency: *People v. Bedell*, 2 Hill, 196.

I conclude that the superintendent was a public officer, because he was intrusted with the public duty of the management, care, and control of the canals of this state, or a portion of them, and was intrusted with the protection of its structures, with the power of directing the movements of those engaged in their navigation, and with the power to bring suits in behalf of the state. The fact that he was appointed by the canal board does not appear to be important. That board is itself but a subordinate creation for the execution of certain specific duties. It is the character or duties of the position, and not the mode of appointment, that determines whether the position is an office or a simple employment. The superintendent, as stated, was appointed by the canal board; the keeper of the penitentiary, above mentioned, was appointed by the supervisors of Albany County, in conjunction with the mayor and recorder of the city; the village collector was appointed by the village trustees; the persons designated to superintend the construction of the public buildings were named by the governor; the commissioners to lay a road were designated by an act of the legislature; while the office of an attorney and counselor was within the possession of any person having the necessary qualifications.

I think the defendant in this action, as a contractor under the statutes of 1854, 1855, and 1857, was invested with the powers, and that he is subject to the liabilities, of a public officer. By the act, Laws of 1857, c. 105, the canal board is

authorized to let by contract, under such regulations as the board shall prescribe, any or all sections of the canals of this state, where in their judgment the repairs may be made more economically than by the superintendents. It is a mere change of instrumentalities; in each case under the regulation of the board, and for the purpose of economy.

By section 2 of the act, the repairs are to be made under the supervision of the resident or division engineer, who is to determine whether they are promptly and properly made, and with suitable materials. This section also provides in substance that the contractor is intrusted with the management of the locks and the general care of navigation, as his compensation is to be withheld if the engineer certifies that the locks are not well and properly attended, or the navigation is not kept free from jams from boats, timber, or other obstructions, or that the feeders are neglected, or that there is not sufficient water for navigation.

By section 5 of the same act, the person so contracting for repairs is empowered to sue in the name of the state, and recover for all trespasses upon the canal or other works, or upon any of its structures, and recover the same penalties imposed by law, or by resolution of the canal board, as may be recovered by a superintendent; and this includes the power at his discretion to seize and detain all boats navigating the canals until the determination of such suits: Statute Powers and Duties of Canal Board, sec. 292 [171], 1 R. S. 247. By the same section of the statute, he is authorized to sue in his own name and recover to his own use all damages he may have sustained in consequence of such acts.

By section 5 of the act of 1860, chapter 213, it is provided that any officer, agent, or employee of the state, contractor for canal repairs, any person in his employ, and any other person having charge or control over the canals of the state, who shall, directly or indirectly, agree to receive any money, etc., for the use of water, etc., shall be deemed guilty of a misdemeanor.

In connection with the right to sue in the name of the state, heretofore granted, the contractor has authority to direct the floats which may be collected near a breach to move backward or forward, or to lie in such place as he shall think advisable; and for a refusal to comply promptly with his directions, the person in charge of the float shall be subject to a penalty of ten dollars: Canal Reg., No. 42. So if any

raft or tow of timber consists of too many sticks of timber, or extending too far outward, or approaches too near another tow, the owner is subject to a penalty of ten dollars, to be collected by the contractor: Reg. 43. By regulation No. 2, if a boat draws too much water, the contractor may immediately compel her to unload, and to pay a fine of twenty-five dollars. So if she does not carry a proper light, or is not properly moored at a dock, or is too slow in entering or leaving a dock (36, 37, 38), or has not a proper rudder, or if her owner attempts to open a lock-gate (44, 46), a like penalty is incurred, to be recovered by him.

It would be tedious to go through with the canal regulations or statutes in detail, and it is sufficient to say that the contractor is authorized to sue, in the name of the state, for breach of the canal regulations from No. 2 to No. 58, with a few exceptions, and for breaches of the statute provisions from 152 to 182, with a few exceptions (see Canal Reg. 66), and that these contain the entire system for the government of the canals, their maintenance, their police regulations, and their litigations.

This entire control of the great public works of the state, the power of instituting suits in the name of the people, of seizing and detaining every float for what he may allege to be a breach of the law or of the canal regulations, the building, repairing, and protecting all the canal structures, I think, devolves upon him the duties of a public officer. Indeed, I am unable, upon a careful examination of the statutes, to find a single important power formerly invested in the superintendent of which the contractor is now deprived. They are all given to him affirmatively.

The chief difference in their positions arises from the circumstance that the superintendent was appointed by the canal board, at a fixed salary, and used the funds and the credit of the state in carrying on his operations, while the contractor is ascertained by a public bidding, subject to the discretion of the board, uses his own funds, furnishes his own materials, and may make or lose money on the result. This does not, in my judgment, affect his position as being charged with the duties of a public officer.

I do not discover in these laws any provision that requires the contractor to take the oath required by the Revised Statutes to be taken by every public officer, nor am I aware of any portion of the statutes quoted which would render him indict-

able in the event of failure to perform his duties. It is possible that he may not, therefore, be technically a public officer. I have, however, endeavored to show that he is allowed to exercise the powers of such an officer, and that the substantial control and management of that great public interest known as the navigable canals of this state, with extraordinary powers, is intrusted to him. He is invested with the powers and duties of a public officer, and if he neglects to perform them, and an individual sustains damages thereby, I think he should be liable as a public officer. The judgment should be affirmed.

SMITH, J. I think the judgment of the general term in this case should be affirmed, on the ground that the defendant by his contract assumed the absolute duty of repairing a public thoroughfare, and is therefore liable in a civil action in behalf of any individual who has sustained special damage as the immediate consequence of his neglect to repair. It is not necessary to the right of action to hold that the defendant is a public officer. By his contract with the state he assumed a duty to the public. If he is not to be regarded as a public officer in all respects, it is at least true that certain public functions formerly discharged by public officers were farmed out to him by authority of law, and for a breach of duty in respect to the exercise of such functions he is liable to any person injured thereby: *Lane v. Cotton*, 1 Ld. Raym. 646, *per Powys, J.*

His duty and liability to persons navigating the canals do not depend on his receiving a compensation from them directly, such as tolls or fees. His duty, being absolute, unconditional, and fixed, differs from that of commissioners of highways, upon whom no duty to repair attaches until funds are provided for that purpose by the public: *Garlinghouse v. Jacobs*, 29 N. Y. 297.

As an affirmance of the judgment below will overrule the decision of the supreme court in the case of *Fish v. Dodge*, 38 Barb. 163, in which I took part, it is proper to say that in that case I regarded the prior decision of the same court in the eighth district in *Minard v. Mead*, 38 Id. 174, note, as controlling, and I therefore followed it, although not satisfied with it.

Judgment affirmed.

People v. Dietz, 13 Abb. Pr., N. S., 163; *Herrington v. Village of Corning*, 51 Barb. 413; *Lament v. Haight*, 44 How. Pr. 4; *Day v. Crossman*, 1 Hun, 571; *Bryan v. Landau*, 3 Id. 502; *Paulling v. Cooper*, 10 Id. 22; *McMahon v. Second Ave. R. R. Co.*, 11 Id. 350; *Bassett v. Fish*, 12 Id. 210; S. C., 75 N. Y. 303; *Hartford etc. Steamboat Co. v. Mayor*, 12 Hun, 554; *Hicks v. Chaffee*, 13 Id. 293; *Connors v. Adams*, 13 Id. 429; *Little v. Banks*, 20 Id. 146; *Goetchens v. Mathewson*, 5 Lans. 221; *French v. Donaldson*, 5 Id. 294; S. C., 57 N. Y. 496, 498; *Conroy v. Gale*, 5 Lans. 348; S. C., 47 N. Y. 665; *Stack v. Bangs*, 6 Lans. 263; *Fulton Fire Ins. Co. v. Balchoin*, 37 N. Y. 649; *Hover v. Barkhoof*, 44 Id. 116, 117, 123, 124; *McCarthy v. City of Syracuse*, 46 Id. 196; *Johnson v. Belden*, 47 Id. 131; *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 Id. 485; *Rector v. Pierce*, 3 Thomp. & C. 418; *Day v. Crossman*, 4 Id. 124; *Bryan v. Landon*, 5 Id. 596; *Warren v. Clement*, 24 Hun, 472, 474; *Briggs v. New York Cent. etc. R. R. Co.*, 30 Id. 294; *Piercy v. Averill*, 37 Id. 361; *Little v. Banks*, 85 N. Y. 263; *Bennett v. Whitney*, 94 Id. 308, — in its application to canal superintendents and canal and highway commissioners, and maintaining the doctrine that a contractor who engages to perform the duties of a public officer is liable to the same extent as an officer upon whom the law imposes the duty. The principal case was distinguished in *East River Gas-Light Co. v. Donnelly*, 93 Id. 561, showing the difference between a public duty to the city or people at large, and not to individuals or for the promotion of any private interest. The principal case was disapproved in *McConnell v. Dewey*, 5 Neb. 389, where it was held that the duties of a supervisor of public roads are of a general public nature, that he acts for the public at large, and that therefore an action at the common law will not lie against him by an individual for an injury occasioned to his person or property by reason of a defect in a public road or bridge. The departure of the New York courts from the common law was there commented upon, and many cases reviewed.

LIABILITY OF PUBLIC OFFICER TO ACTION BY PRIVATE INDIVIDUAL FOR FAILURE TO PERFORM PUBLIC DUTIES. — Public officers may be divided into two classes: 1. Those who act for the public collectively, whose duties are of a general public nature, who act for the public at large, and who receive compensation from the public treasury; 2. Those who act for the public distributively, who are appointed to act, not for the public in general, but for such individuals as may have occasion to employ them for a specific purpose, and who receive compensation from individuals, who pay them for particular services rendered. To this latter class belong such officers as sheriffs, constables, notaries public, coroners, recorders of deeds, clerks of courts, inspectors of meats, and the like. The object of this note is to deal with the former class only, and even in that field of inquiry the question as to whether a public officer is responsible for the acts of his deputy, subordinates, or employees will be excluded as too comprehensive for the brief treatment which it would necessarily receive in a limited note.

JUDICIAL OFFICERS AND OFFICERS WHO EXERCISE DISCRETIONARY POWERS.

— The judge of a superior court is not answerable in damages for any mistakes committed in the exercise of his office, or for any hurtful consequences which flow from his judgments, when acting within his jurisdiction: *Morgan v. Dudley*, 68 Am. Dec. 735, note 750; note to *Kelly v. Bemis*, 64 Id. 51-55, on liability for acts done under unconstitutional statute; *Rochester W. L. Co. v. Rochester*, 53 Id. 316, collected cases in note thereto 322; collected cases in notes to *Shearman and Redfield on Negligence*, sec. 160; 2 *Thompson on Negligence*, p. 817; *Whittaker's Smith on Negligence*, p. 364; but the judges of inferior tribunals are sometimes held responsible for the consequences of their

injurious acts, although within their jurisdiction, when prompted by malice or corrupt motives: *Kelly v. Bemis*, 4 Gray, 83; S. C., 64 Am. Dec. 50, note 51; *Barkeloo v. Randall*, 4 Blackf. 476; S. C., 32 Am. Dec. 46, note 49; *State v. Flinn*, 3 Blackf. 72; *Wasson v. Canfield*, 6 Id. 406; *Pratt v. Gardner*, 2 Cush. 63; *Morgan v. Hughes*, 2 Term Rep. 225; *Garfield v. Douglass*, 22 Ill. 100; *Wasson v. Mitchell*, 18 Iowa, 153. The general rule, however, is that all officers who act judicially are not liable in damages to an individual for their acts, however negligent, mistaken, or ignorant, and whatever hurtful consequences may follow: See collected cases in note to *Wilson v. Mayor of New York*, 43 Am. Dec. 724; note to *Rochester W. L. Co. v. Rochester*, 53 Id. 322; *Erie River Gas-Light Co. v. Donnelly*, 93 N. Y. 557; *Walker v. Hallock*, 32 Ind. 239; *Steele v. Dunham*, 26 Wis. 393; *Porter v. Haight*, 45 Cal. 631; *Harman v. Brotherson*, 1 Denio, 537; *Wilson v. Mayor etc. of New York*, 1 Id. 595; *Weaver v. Devendorf*, 3 Id. 117; *Palmer v. Lawrence*, 6 Lans. 282; *Wertheimer v. Howard*, 30 Mo. 420; *Chickering v. Robinson*, 3 Cush. 543; *Way v. Townsend*, 4 Allen, 114; *Millard v. Jenkins*, 9 Wend. 298; *Wickware v. Bryan*, 11 Id. 545; *Raymond v. Bolles*, 11 Cush. 315; *Yates v. Lansing*, 5 Johns. 282; affirmed 9 Id. 395; *Burnham v. Stevens*, 33 N. H. 247; *Lillenthal v. Campbell*, 22 La. Ann. 600. So officers other than judicial exercising a discretion which the law gives them are not personally liable for acts done honestly, even though that discretion be exercised so mistakenly as to work an injury to private property or private individuals; but they are liable if they act maliciously or wantonly, and if such act is done rather to injure an individual than to discharge a public duty: *Yealy v. Fink*, 43 Pa. St. 212; S. C., 82 Am. Dec. 556; note to *County Commissioners v. Duckett*, 83 Id. 563; *Downer v. Lent*, 6 Cal. 94; S. C., 65 Am. Dec. 489, collected cases in note thereto 490; collected cases in note to *Wilson v. Mayor etc.*, 43 Id. 724. It may here be remarked that all acts which from the beginning to the end of a suit the law requires a justice of the peace to perform are, it seems, to be regarded as judicial, and as involving only that responsibility which attends all judicial officers: *Wertheimer v. Howard*, 30 Mo. 420. And unless there be fraud or an evil intent, case will not lie against a justice of the peace who, by negligence or carelessness, gives erroneous information as to the amount of a judgment rendered by him to a party about to prosecute an appeal, by means whereof the appeal is lost: *Wickware v. Bryan*, 11 Wend. 545.

The rule that officers invested with judicial powers are not liable for negligence has been held to apply to grand jurors for their action on the grand jury: *Turpen v. Booth*, 56 Cal. 65; S. C., 38 Am. Rep. 48; a town board of equalization in determining the value of land: *Steele v. Dunham*, 26 Wis. 393; a board of supervisors in examining, settling, and allowing accounts chargeable to the county: *People v. Stocking*, 50 Barb. 573; a board of prison directors in determining whether the exigency of a particular case required them to annul a contract for the employment of convict labor: *Porter v. Haight*, 45 Cal. 631; commissioners in bankruptcy: *Cunningham v. Bucklin*, 8 Cow. 178; to members of the legislature, including members of municipal assemblies: 2 Thompson on Negligence, 817; *Walker v. Hallock*, 32 Ind. 239; to members of board of pilot commissioners in wrongfully revoking a pilot's license: *Downer v. Lent*, 6 Cal. 94; S. C., 65 Am. Dec. 489; to boards of supervisors for mistakes or errors made in the approval of official bonds: *Wasson v. Mitchell*, 18 Iowa, 153; to assessors in determining the value of taxable property, where such value is not sworn to as authorized by law: *Weaver v. Devendorf*, 3 Denio, 117; *Palmer v. Lawrence*, 6 Lans. 282; the latter case, however, showing that assessors are personally responsible for assessing non-

inhabitants; to city officials whose duty it is to receive, pass upon, or reject bids: *East River Gas-Light Co. v. Donnelly*, 93 N. Y. 557. So the duties of election officers seem to be of a judicial nature, and they have been held not liable to an action for refusing an elector's vote, unless they act corruptly or maliciously: *Pike v. Megoun*, 44 Mo. 491; *Bevard v. Hoffman*, 18 Md. 479; *Jenkins v. Waldron*, 11 Johns. 114; S. C., 6 Am. Dec. 359; *Goetchens v. Matthewson*, 5 Lans. 214; *Wheeler v. Patterson*, 1 N. H. 88; S. C., 8 Am. Dec. 41. *Contra*, that a selectman who refuses a citizen's vote is liable for damages, see *Capen v. Foster*, 12 Pick. 485; S. C., 23 Am. Dec. 632. The officers of a municipal corporation are vested with legislative powers, and are exempt from personal liability for the mistaken use of such powers, if within their authority, and if they exceed their powers their acts are void, and consequently do not impose personal liability: *Jones v. Loving*, 55 Miss. 109; S. C., 30 Am. Rep. 508; so where a mutual mistake has been made as to the location of a place upon which improvements were to be made, it being outside of the corporate limits instead of within them, the common council is not liable to a contractor damaged by such mistake: *Newman v. Sylvester*, 42 Ind. 106. The rule that officers invested with discretionary powers are not liable for negligence has been applied to members of a city council in the exercise of a discretion confided to them by law: *Baker v. State*, 27 Id. 485; *Edwards v. Ferguson*, 73 Mo. 686; to a militia officer for injurious acts done by militia: *Ella v. Smith*, 5 Gray, 121; S. C., 66 Am. Dec. 356; to township supervisors for injury caused by building a causeway instead of a bridge: *Yealy v. Fink*, 43 Pa. St. 212; S. C., 82 Am. Dec. 556; and to the wardens or inspectors of a penitentiary in respect to the tort of a convict permitted by them, in their discretion, to go at large: *Schoettger v. Wilson*, 48 Mo. 253. Public officers, however, whose duties are principally judicial, may perform ministerial functions, and in respect to them they may be liable for negligence at the suit of a private individual who is specially injured thereby: *Tompkins v. Sands*, 24 Am. Dec. 46, note 50; note to *Wilson v. Mayor etc.*, 43 Id. 724; *Rochester W. L. Co. v. Rochester*, 53 Id. 316, note 322; *Fairchild v. Keith*, 29 Ohio St. 156; *Gaylor v. Hunt*, 23 Id. 255; *Place v. Taylor*, 22 Id. 317; *Wasson v. Mitchell*, 18 Iowa, 153; *Houghton v. Swarthout*, 1 Denio, 589; *Tompkins v. Sands*, 8 Wend. 462; *Pike v. Megoun*, 44 Mo. 491; *Tyler v. Alford*, 38 Me. 530. Thus if a justice of the peace neglects to make in his docket the inventory required by law, where he has taken an acknowledgment of a chattel mortgage, he is doubtless liable to any one who is thereby injured for the damage occasioned by such neglect: *Harlow v. Birger*, 30 Ill. 425. So in granting or refusing a license to retail spirituous liquors, a probate judge acts ministerially, and an action lies on his official bond if he improperly refuses a license: *Grider v. Tally*, 77 Ala. 422; S. C., 54 Am. Rep. 65. If a justice of the peace, on request, issues an execution invalid on its face, he is liable for such damages as are the natural, necessary, and proximate consequences of his wrongful act: *Noxon v. Hill*, 2 Allen, 215; or where he issues execution in two or three hours after he renders judgment, under a statute giving the right to it after the expiration of twenty-four hours: *Briggs v. Wardwell*, 10 Mass. 356; or where he issues an execution against the body of a person who is by law privileged from imprisonment: *Percival v. Jones*, 2 Johns. Cas. 49. In Missouri, the act of a justice in issuing execution is regarded as a judicial act: *Wertheimer v. Howard*, 30 Mo. 420. In Ohio and Massachusetts, it is considered a ministerial act: *Gaylor v. Hunt*, 23 Ohio St. 255; *Fairchild v. Keith*, 29 Id. 156; *Briggs v. Wardwell*, 10 Mass. 357.

CASES IN WHICH PUBLIC OFFICERS, OTHER THAN JUDICIAL, HAVE BEEN HELD NOT LIABLE. — Public officers acting within the scope of their authority are not answerable in damages for the consequences of their acts, unless done maliciously and with intent to injure: *Burton v. Fulton*, 49 Pa. St. 151; *Stewart v. Southard*, 17 Ohio, 402; S. C., 49 Am. Dec. 463; *Tinsman v. Belvidere etc. R. R. Co.*, 26 N. J. L. 148; S. C., 69 Am. Dec. 565. Under this rule, it has been held that an action cannot be maintained for injuries resulting to individuals from acts done by persons in the execution of a public trust and for the public benefit, acting with due skill and caution, within the scope of their authority: See case last cited; that the trustees of a state institution are not personally liable for a mere wrongful and illegal breach of contract: *Chamberlain v. Clayon*, 56 Iowa, 331; S. C., 41 Am. Rep. 101; that an action is not maintainable against school directors by one who withdraws his children from school because such directors erroneously admitted colored children: *Stewart v. Southard*, 17 Ohio, 402; S. C., 49 Am. Dec. 463; that an action is not maintainable by a teacher against school directors for maliciously conspiring to remove her from her position without proof of malice, an intent to injure, and an unlawful conspiracy: *Burton v. Fulton*, 49 Pa. St. 151; that school trustees were not personally and individually liable to a teacher who was teaching for a stipulated compensation under a contract, and who was willing to finish her term, but where the trustees before the close of the term removed the pupils under her charge: *Morrison v. McFarland*, 51 Ind. 206; that a person is not liable as a wrong-doer when the act is authorized by the legislature, the necessary and natural consequence of which is damage to another's property, and the mode in which damage shall be ascertained and compensated is prescribed: *Aldrich v. Cheshire R. R. Co.*, 21 N. H. 359; S. C., 53 Am. Dec. 212; that mail contractors are public agents, and not responsible for a letter containing money lost by the carelessness of their agent who carried the mail: *Comwell v. Voorhees*, 13 Ohio St. 523; S. C., 42 Am. Dec. 206; but as to this, see note thereto 208-210, on liability of postmasters for loss of mail; and see *infra*; that a board of commissioners, appointed by an act of the legislature, with power to turn or straighten the channel of a river in order to protect a populous portion of the country from threatened inundation, are not liable for damages to others caused by the work, resulting from mere errors of judgment in the commissioners, provided they keep within the scope of their powers and exercise their judgment honestly, and do not act maliciously, oppressively, or arbitrarily: *Green v. Swift*, 47 Cal. 536; that prison managers are not liable to a prisoner who, in performing work, loses his hand by a circular saw: *Alamango v. Supervisors of Albany Co.*, 25 Hun, 551; nor for an injury to a prisoner who, on account of refractory conduct, is put into solitary confinement, and suffers because of insufficient food, clothing, and fires: *Williams v. Adams*, 3 Allen, 171; that levee commissioners are not liable to a plantation owner whose plantation is overflowed through a defect in the levee: *Nugent v. Levee Commissioners*, 58 Miss. 197; that trustees of union free schools, in an action brought against all the members of such board jointly as trustees, and charging them as public officers, and not as individuals, were not personally and individually liable for allowing a school-house to get out of repairs, whereby a person sustained special damage, — the liability being held to attach to the corporate body, and not to the individuals composing it: *Bassett v. Fish*, 75 N. Y. 303, reversing 12 Hun, 209; that a public officer is not personally responsible for the necessary and unavoidable destruction of goods stored in buildings, when such buildings were destroyed by him in the lawful performance of a public duty imposed upon

him by a valid and constitutional statute: *American Print Works v. Lawrence*, 21 N. J. L. 248; S. C., 23 Id. 590; 57 Am. Dec. 420; and that a mortgagee cannot maintain a suit upon a county treasurer's bond for neglect to collect taxes out of the mortgagor's personal property: *State v. Harris*, 89 Ind. 363; S. C., 46 Am. Rep. 169.

PUBLIC OFFICERS ACTING MINISTERIALLY ARE LIABLE FOR NON-FEASANCE AND MISFEASANCE. Notwithstanding the foregoing cases, where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from such non-feasance or misfeasance, and a mistake as to what his duty is and honest intentions will not excuse him: *Amy v. Supervisors*, 11 Wall. 136; *Sawyer v. Corse*, 17 Gratt. 230; *Bassett v. Fish*, 12 Hun, 209; *Piercy v. Averill*, 37 Id. 360; *Bennett v. Whitney*, 94 N. Y. 302; *Jenner v. Joliffe*, 9 Johns. 381; *Adsit v. Brady*, 4 Hill, 630; S. C., 40 Am. Dec. 305, extended note 308, and numerous cases cited therein; *Rounds v. Mansfield*, 38 Mo. 586; *Bailey v. Mayor etc.*, 3 Hill, 531; S. C., 38 Am. Dec. 669; *Maxwell v. Pike*, 2 Mo. 8; *McCarty v. Baser*, 3 Kan. 237; *Wilson v. Mayor etc.*, 1 Denio, 595; S. C., 43 Am. Dec. 719, note 724; note to *Kelly v. Bemis*, 64 Id. 53, on liability of ministerial officers for acts done under unconstitutional statute; *Clark v. Miller*, 54 N. Y. 528; *Clark v. Miller*, 47 Barb. 38; *Williams v. Adams*, 3 Allen, 171; *Henley v. Mayor of Lyme Regis*, 5 Bing. 91; *Hover v. Barkhoof*, 44 N. Y. 113.

1. *Canal Contractors and Superintendents* in New York are held liable to individuals using the canal for any damages they may sustain in consequence of neglect on the part of such persons in failing to perform the duties imposed upon them by law: See principal case; *Tremain v. Cohoes Co.*, 2 N. Y. 163; *Adsit v. Brady*, 4 Hill, 630; S. C., 40 Am. Dec. 305, extended note thereto 308, and numerous cases therein cited on the liability of a public officer who neglects an imperative duty; *Griffith v. Follett*, 20 Barb. 620; *Riddle v. Proprietors etc.*, 7 Mass. 169; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; *French v. Donaldson*, 57 Id. 496; S. C., 5 Lans. 293; *Conroy v. Gale*, 5 Id. 344; S. C. affirmed, 47 N. Y. 665; *Stack v. Bangs*, 6 Lans. 262; *Johnson v. Belden*, 2 Id. 433; S. C. affirmed, 47 N. Y. 130. Such officer is liable for not keeping the canals free from all obstructions to navigation: *Hicks v. Dorn*, 54 Barb. 172; S. C., 42 N. Y. 47; 9 Abb. Pr., N. S., 47; 1 Lans. 81; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; *Griffith v. Follett*, 20 Barb. 620; or for allowing them to get out of repair: *French v. Donaldson*, 57 Id. 496; S. C., 5 Lans. 293; *Johnson v. Belden*, 2 Id. 433; S. C. affirmed, 47 N. Y. 130; *Conroy v. Gale*, 5 Lans. 344; S. C. affirmed, 47 N. Y. 665. If such an officer in the supposed performance of his duty commits a trespass upon private property, he must pay damages, unless he can justify under some statute or under a plea of overruling necessity. Accordingly, a contractor was held liable for cutting up a sunken canal-boat in order to clear the channel when it appeared that he might have accomplished the same end by other means: *Hicks v. Dorn*, 42 Id. 47; S. C., 9 Abb. Pr., N. S., 47; 1 Lans. 81; 54 Barb. 172. So a canal contractor who by blasting rocks injured a person lawfully at work upon adjacent premises was held liable to pay damages: *St. Peter v. Denison*, 58 N. Y. 416. It is not necessary that the contractor should have had notice of the defect which caused the injury: *Conroy v. Gale*, 5 Lans. 344; S. C. affirmed, 47 N. Y. 665; *Stack v. Bangs*, 6 Lans. 262. That the doctrine laid down in *Adsit v. Brady*, 4 Hill, 630, S. C., 40 Am. Dec. 305, as applicable to superintendents, is held applicable to the case of a canal contractor, see *Conroy v. Gale*, 5 Lans. 344; S. C. affirmed, 47 N. Y. 665.

2. Other Officers, and Distinction between Acts of Omission and Commission.

—The liability of public-highway and road officers for injuries occasioned by their neglect of duty is discussed in an extended note to *County Commissioners v. Duckett*, 83 Am. Dec. 563-566; see also *Commissioners v. Martin*, 69 Id. 333. Under the code of Mississippi, it is held that when a bridge is built by a public contractor under a contract with the county court, whereby the contractor becomes obliged to keep it in repair for a stated period of time, he, and not the police board, is liable for damages which travelers may sustain in consequence of its being out of repair: *Sutton v. Board of Police*, 41 Miss. 236. The tender of a drawbridge is liable for injuries caused by an improper discharge of his duties: *Nowell v. Wright*, 3 Allen, 166; S. C., 80 Am. Dec. 62, collected cases in note thereto 65. State officers may give third persons a right of action against the publisher of state reports for a failure to comply with the contract for such publication: *Little v. Banks*, 20 Hun, 143; S. O. affirmed, 85 N. Y. 285. One whose duty it is to see that all unsafe buildings in a city are taken down or made secure is liable for a neglect of his official duty to a person who is injured thereby: *Connors v. Adams*, 13 Hun, 427; *Bailey v. Mayor etc.*, 3 Hill, 531; S. C., 38 Am. Dec. 669; so with officers whose duty it is to keep a sea-wall in repair: *Henley v. Mayor of Lyme Regis*, 5 Bing. 91; so is a pound-keeper responsible in damages to the person injured for all illegal doings or defaults: *Rounds v. Mansfield*, 38 Me. 586. A city engineer acting as such is liable for negligence or fraud only; acting as a professional surveyor, he is liable for negligence, fraud, and a want of reasonable and ordinary skill, but in neither capacity is absolute correctness in performing the work the test of the amount of skill required: *McCarty v. Bauer*, 3 Kan. 237. Public officers charged with quasi public trusts, in the discharge of which private persons are interested, under laws creating the obligations of contracts, are answerable for not discharging their duty: *Voe v. Reed*, 54 N. Y. 657; *Bassett v. Fish*, 12 Hun, 209. Supervisors are personally responsible for refusing to obey a writ of mandate requiring them to levy a tax: *Amy v. Supervisors*, 11 Wall. 136; and where property has been reassessed, and the plaintiff requests one of the members of the board of supervisors to lay the last assessment before the board, and he refuses to do so, claiming that the reassessment was invalid and illegal, an action for damages can be maintained against him: *Clark v. Miller*, 47 Barb. 39; S. C., 54 N. Y. 528. Selectmen of town are liable for property sold to satisfy a tax which is illegal and void: *Drew v. Davis*, 10 Vt. 506; S. C., 33 Am. Dec. 213. The commanding officer of militia is liable for injurious acts to third persons done by such militia: See extended note to *Ela v. Smith*, 66 Id. 366.

If a public officer intrusts his public duty, which he ought to do himself, to another person, who neglects to perform the duty, the public officer is liable to an action for negligence. If he is permitted by statute to delegate his duties to another, and does so, that other becomes responsible; but if he continues to act, he himself is responsible: Whittaker's Smith on Negligence, p. 361, and English cases there cited. The public officers of a city upon whom is imposed the duty of keeping streets, sidewalks, sewers, and drains in repair are personally and individually liable in damages for injuries occasioned by their negligent acts and omissions: *Piercy v. Averill*, 37 Hun, 361; *Bennett v. Whitney*, 94 N. Y. 302; *Wilson v. Mayor etc.*, 1 Denio, 595; *McMahon v. Second Av. R. R. Co.*, 11 Hun, 347; *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 475. In *Piercy v. Averill*, 37 Hun, 360, where an action was brought against the persons who held the offices of mayor and of aldermen of the city

of Ogdensburg for their failure to keep sidewalks in repair, it was said that the argument that public policy should forbid the court from holding the defendants liable, inasmuch as such a rule of liability would drive from the common council persons of responsibility, was entitled to but little weight. The postmaster-general, postmasters, deputy postmasters, and mail contractors are liable to individual injured by their negligence or default in losing mail matter intrusted to their charge: See extended note to *Conwell v. Voorhees*, 42 Am. Dec. 208-210; *Teall v. Felton*, 49 Id. 352. A collector of customs may be held liable in damages for detaining plaintiff's vessel for a pretended breach of federal laws: *Woodham v. Gelston*, 1 Johns. 134; or for losing plaintiff's goods while on deposit in a custom warehouse, if he is negligent in keeping them safe: *Brisac v. Lawrence*, 2 Blatch. 121; or for refusing to sign a bill of entry for landing a cargo of foreign wheat without payment of duty where no duty is payable by law: *Barrow v. Arnaud*, 10 Jur. 319; or for retaining and refusing to deliver goods after the duties are paid, or bond given or tendered: *Tracy v. Swarthout*, 10 Pet. 80. School trustees are liable for property sold by them under an illegal tax levy and warrant: *Baker v. Freeman*, 9 Wend. 36; *Clark v. Hallock*, 16 Id. 607. A tax collector is liable for a false return of *nulla bona*, whereby the owner of a mortgage of lands is compelled to redeem from a tax sale: *Raynsford v. Phelps*, 43 Mich. 342; S. C., 38 Am. Rep. 189; and damages may be allowed against the supervisors of a town for a refusal to put a judgment on the tax list: *Newark Savings Institution v. Panhorst*, 7 Biss. 99; *Dow v. Humbert*, 91 U. S. 294. An effort is sometimes made in determining the liability of a public officer to make a distinction between acts of omission or non-feasance and acts of trespass or malfeasance, and to show that such officers are not liable for mere acts of omission: 2 Thompson on Negligence, 822, and English cases there cited. It is doubtful whether the English cases cited by Mr. Thompson sustain such a distinction, for Best, J., in the widely cited case of *Henley v. Mayor of Lyme Regis*, 5 Bing. 107, 108, said "that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous that it would be a waste of time to refer to them." And such a distinction is not maintained in this country, at least not in New York: See principal cases, *Bartlett v. Crozier*, 15 Johns. 250; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; *Adelt v. Brady*, 4 Hill, 630; S. C., 40 Am. Dec. 305; *Piercy v. Averell*, 37 Hun, 360; *Hover v. Barkhoof*, 44 N. Y. 113; *Clark v. Miller*, 54 Id. 258; *Bennett v. Whitney*, 94 Id. 302; *Goetcheus v. Matthewson*, 5 Lans. 221; compare *McMillan v. Richards*, 70 Am. Dec. 655. In the case of one whose duty it is to repair highways, it may sometimes be necessary to show that he had adequate means in his hands to make such repairs before he can be held liable for non-feasance or omission to act at all; but as a general rule, it is not sufficient to show that he had no funds on hand wherewith to cause the necessary repairs to be made; but he must show that he has sought through the proper channels to procure the said funds, or he will be liable for an omission to act: *Bennett v. Whitney*, 94 N. Y. 308; *Warren v. Clement*, 24 Hun, 472; *Rector v. Pierce*, 3 Thomp. & C. 418. A complaint, however, must allege the possession of funds wherewith to repair: *Evelaigh v. Town of Hounsfield*, 34 Hun, 140; and a want of funds is no defense to an action for malfeasance: *Rector v. Pierce*, 3 Thomp. & C. 418.

SAVAGE v. MURPHY.

[34 NEW YORK, 503.]

DEED BY ONE IN DEBT TO HIS WIFE AND CHILDREN FOR NOMINAL CONSIDERATION IS FRAUDULENT and void as to subsequent creditors, where the grantor remains in possession without apparent change of ownership, and continues in business, paying past indebtedness by obtaining new credit, and contracting new debts until he fails in business.

IT IS FRAUD FOR OWNER OF PROPERTY, AFTER ATTEMPTING TO PLACE IT BEYOND REACH OF HIS CREDITORS, to try to obtain a new credit by means of continued possession and apparent ownership.

TRANSFER OF INDEBTEDNESS IS NOT PAYMENT; as where one in debt transfers his property to his wife and children, but remains in possession, having the apparent ownership and continuing in business; the fact that he paid up all indebtedness existing at the time of the transfer by means of credit obtained afterward is only a transfer, and not a payment of the then existing indebtedness.

ACTION by Savage, a receiver appointed in proceedings supplementary to execution to set aside conveyances of real estate, made by the defendant, George Murphy, the judgment debtor, to the other defendants, his wife and children, as fraudulent and void, on the ground that they were made by the debtor with intent to defraud his creditors. After the conveyance, several judgments were recovered against Murphy for debts contracted by him on the credit and faith that he was the owner of the property. The cause was tried by the court without a jury. The court found that Murphy made the conveyance to defraud his creditors, and particularly the creditors on whose claims the judgments were recovered. It also decided, as matter of law, that the conveyances were void as against the judgment creditors mentioned in the complaint. Judgment was ordered accordingly, and affirmed at the general term. From the judgment of affirmance the defendants appealed. Other facts are stated in the opinion.

John Thompson, for the appellants.

E. N. Taft, for the respondent.

By Court, SMITH, J. The case upon the facts found is briefly this: The judgment debtor, being engaged in an extensive business in the city of New York on credit, in which he was considerably indebted, stripped himself of the title to all his property by transfer to his wife and children for a merely nominal pecuniary consideration, without any visible change of possession, and with the intent to contract and continue a future indebtedness in his business on the credit of his apparent

ownership of the property transferred, and to avoid payment of his debts. After the transfers, he continued in business, making new purchases on credit, and using part of the avails of each successive purchase to pay the indebtedness then existing during about ten months, at the end of which time he failed, owing debts thus contracted amounting to more than \$3,450,—among which were the debts for which judgments were recovered, as alleged in the complaint.

Upon these facts, it is clear that the transfers thus made were fraudulent and void against subsequent creditors. The fraud consisted in the design to obtain a credit thereafter by means of his continued possession and apparent ownership of the property which he thus placed beyond the reach of those who should give him such future credit; and consequently the conclusion of fraud is not repelled by the circumstance that the debts owing by him at the time of the transfers were paid with the proceeds of credit subsequently acquired by the means above stated. The indebtedness then existing was merely transferred, not paid, and the fraud is as palpable as it would be if the debts now unpaid were owing to the same creditors who held them at the time of the transfers.

As the evidence in the case fully supports each of the findings above referred to, they are conclusive. The judgment must therefore be affirmed, unless there is merit in the exception taken by the defendants' counsel to the admission of the testimony of the witness Budlong as to declarations made by the grantor respecting the conveyances subsequently to their execution. The testimony was offered for the purpose of contradicting Murphy, the grantor, who had been previously examined, and whose attention had been called to this statement to Budlong; it was properly admitted for that purpose.

The appellant's counsel argues, however, that although admissible to contradict, it was improperly treated by the court as evidence in chief, and as tending to show a fraudulent intent. This claim is based upon an expression used in the opinion of the judge who tried the cause. The opinion is very far from showing clearly that the judge so treated the testimony; but if it did show it, the point would be unavailing. The only question raised by the exception is as to the admissibility of the testimony; and there being other testimony in the case sufficient to uphold the conclusions of the trial judge on all points, no error is shown.

The judgment should be affirmed.

FRAUDULENT CONVEYANCE MADE IN CONTEMPLATION OF FUTURE INDEBTEDNESS, effect of as to subsequent creditors: *Beeckman v. Montgomery*, 80 Am. Dec. 229, note 234; *Cook v. Johnson*, 72 Id. 381, note 384. A voluntary settlement on wife by husband, while engaged in business and involved in debt, is fraudulent as against creditors, no matter how pure the motive which induced it: *Belford v. Crane*, 84 Id. 155, note 163, showing that as to subsequent creditors fraud in fact must be established.

HUSBAND'S CONVEYANCE OF REALTY TO WIFE, TO SECURE IT TO HER FREE FROM DEBTS which he may contract in a new business which he is about to engage in as a partner, is void and of no effect as against subsequent creditors of the partnership: *Mullen v. Wilson*, 84 Am. Dec. 461, and note 464.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: A transfer of property may be made under such circumstances as to be fraudulent against subsequent creditors, as well as those existing at the time: *In Matter of Brown*, 39 Hun, 29; and it is well settled, where a deed is set aside as void as to existing creditors, that all the creditors, prior and subsequent, share in the fund *pro rata*: *Kehr v. Smith*, 10 Nat. Bank. Reg. 53; S. C., 20 Wall. 36, and numerous cases there cited. A deed is not *per se* fraudulent, even against existing creditors, merely because it is voluntary. The want of a consideration is only a circumstance from which with other circumstances fraudulent intent may be inferred. Still less is it *per se* fraudulent and void as against subsequent creditors. There must be circumstances showing actual fraud to impeach the conveyance, and facts proved to show that actual fraud was contemplated: *Young v. Heermans*, 66 N. Y. 381; *Shand v. Hanley*, 71 Id. 322; *Teed v. Valentine*, 65 Id. 474; *Dunlop v. Hawkins*, 59 Id. 348; *Kennedy v. McGuire*, 15 Hun, 72; *Wells v. O'Connor*, 27 Id. 428. Thus if a voluntary conveyance is made immediately before engaging in some hazardous business or enterprise, or obligations are incurred so soon after the conveyance as to warrant a presumption that actual fraud was intended, or other circumstances lead to the same inference, a deed will be adjudged fraudulent and void as well against the subsequent as existing creditors: *Young v. Heermans*, 66 N. Y. 381; *Shand v. Hanley*, 71 Id. 322; *Davis v. Leopold*, 87 Id. 622; *Pendleton v. Hughes*, 65 Barb. 144; *Smart v. Harring*, 62 How. Pr. 507, where various illustrations of this principle are given. Where a person is indebted, a voluntary disposition of his property, which has the effect of hindering, delaying, or defrauding present or prospective creditors, will not be sustained: *Martin v. Walker*, 12 Hun, 51; *Young v. Carter*, 10 Id. 199. So where one engaged in a hazardous business makes a settlement upon his wife as an anchor to protect his family in case of insolvency, and is at the time, though solvent, weak and unsteady in his pecuniary matters, the settlement is fraudulent, and may be set aside: *Sedgwick v. Place*, 10 Nat. Bank. Reg. 32, 43; S. C., 12 Blatchf. 168, 179. But a conveyance made to children for love and affection is not fraudulent or void against subsequent creditors if at the time of the conveyance the grantor had sufficient property otherwise to pay then subsisting creditors: *Holmes v. Clark*, 48 Barb. 238. So a post-nuptial settlement made in consideration of relinquishment of dower and of maintenance, especially where the wife's trustee joins in the covenants that the wife will, in consideration of the settlement made, relinquish all claims to dower in her husband's estate, and will contract no debts on his account, etc., will be upheld in law, because it is for a valuable consideration; and it cannot be assailed in equity by the husband's creditors, unless the amount so settled on the wife is unreasonable or excessive: *Smith v. Kehr*, 7 Nat. Bank. Reg. 105. But where, prior to his dis-

charge, a bankrupt placed property in the hands of another to be held for his benefit, and to be restored after his discharge, or where he disposed of his property, with intent to defraud his creditors, to one cognizant of the fraudulent intent, an action is maintainable by the holder of the judgment by confession, after return of execution thereon unsatisfied, to procure satisfaction thereof out of the property so transferred. Such a trust is void by statute, both as to existing and subsequent creditors, and such a fraudulent transfer is also void, the transferee becoming a trustee *ex maleficio* for both classes of creditors: *Dewey v. Moyer*, 72 N. Y. 76. The transfer of a debt is not a payment of it: *Dunlap v. Hawkins*, 2 Thomp. & C. 297. The principal case was distinguished in *Sparkman v. Place*, 5 Ben. 197; *Baker v. Gilman*, 52 Barb. 38; *Seaman v. Wall*, 54 How. Pr. 49; *Carr v. Bressa*, 81 N. Y. 589; S. C., 18 Hun, 136.

ROTH v. BUFFALO AND STATE LINE R. R. Co.

[34 NEW YORK, 543.]

COMMON CARRIERS OF PASSENGERS WITH THEIR ORDINARY BAGGAGE, FOR HIRE, ARE LIABLE for losses occurring from any accident to the baggage while it is in their keeping as carriers, except those arising from the act of God or a public enemy.

LIABILITY OF COMMON CARRIER OF PASSENGERS FOR THEIR BAGGAGE ENTRUSTED TO HIS CARE TERMINATES within a reasonable time after the arrival of the baggage at the point of destination, where the carrier is ready to deliver the same to the passenger according to the terms of the contract.

QUESTION OF REASONABLE TIME IS ORDINARILY MIXED ONE OF FACT AND LAW.

WHERE TESTIMONY IS CONFLICTING, AND FACTS ARE UNSETTLED, the jury are to decide, under the instructions of the court, as to the law.

WHERE THERE IS NO DISPUTE AS TO FACTS, the question is purely one of law, and the court should decide it.

CARRIER LIABLE ONLY AS BAILEE, WHEN. — Where passenger refuses or neglects to remove his baggage within a reasonable time after reaching the place of his destination, and the carrier thereafter retains it unclaimed by the owner, his liability is changed from that of an insurer to the responsibility of an ordinary bailee, liable only for losses occasioned by his own fault.

WHERE UNDISPUTED FACTS SHOW CONDUCT OF PASSENGER, in neglecting to call for his baggage after reaching place of destination, to be unreasonable, it should be so held as a matter of law.

RAILROAD COMPANY IS NOT LIABLE FOR PASSENGER'S TRUNK, where he did not call for it after reaching the place of destination, but left it in the hands of the company over night, for his own convenience, and without any arrangement with them, and where it was destroyed by the burning of the depot before morning by an accidental fire, which did not occur from any negligence or fault on the part of the company. The subsequent liability of the company became simply that of an ordinary bailee.

ACTION to recover the value of a trunk and its contents, the property of Vincent Dunn, the plaintiff's assignor, which a

carrier refused to deliver or account for to Dunn or the plaintiff. The facts are stated in the opinion. The cause was tried by a justice without a jury. Judgment for plaintiff for \$47.50 damages, with costs. This judgment was reversed on appeal to the county court of Erie. The judgment of reversal was affirmed on appeal to the superior court of the city of Buffalo, and from the judgment of affirmance the plaintiff appealed to this court.

James A. Allen, for the appellant.

Sprague and Fillmore, for the respondents.

By Court, SMITH, J. All extraneous circumstances stated by the witnesses being rejected, the case proved is briefly this: Dunn, the plaintiff's assignor, took passage, with his trunk, at Dunkirk, for Buffalo, on the defendants' cars. Immediately on the arrival of the cars at the place of destination, he went from the depot without looking for his trunk or saying anything about it to the defendants' agents, and left it in their hands, as he himself testified, solely for his own accommodation. The agents of the company immediately proceeded to unload the baggage on the train, and without any unnecessary delay were ready to deliver it, and did deliver all that was called for at the platform by persons having checks. They carefully stored what remained, and during the night the depot and portions of the baggage were consumed by fire, without fault on the part of the defendants, and doubtless Dunn's trunk was among the baggage thus destroyed.

The irregularity of the trains, and the consequent accumulation of baggage at the Buffalo station, the lateness of the hour, and the state of the weather, the fact that Dunn's wife was under his charge, and that he saw no carriage at the door from which he made his exit, are circumstances of no moment, since it is not shown that they rendered it unsafe or improper for him to receive his trunk on its arrival, and besides, it distinctly appears that they did not influence his conduct. According to his own statement, he left his trunk at the depot over night because "it was on his route the next morning." What his route on the next morning was does not appear, and it is not important, for the fact is undisputed that he had reached the termination of his route on the road of the defendants, and their contract to transport him and his baggage was fully performed.

It is well settled in this state that common carriers of passengers with their ordinary baggage for hire are liable for losses occurring from any accident to the baggage while it is in their keeping as carriers, except those arising from the act of God or a public enemy: *Hollister v. Nowlen*, 19 Wend. 234 [32 Am. Dec. 455]; *Cole v. Goodwin*, 19 Id. 251; *Powell v. Myers*, 26 Id. 591. This liability once commenced does not necessarily terminate with the transit, but *prima facie* continues until safe delivery of the baggage to its owner: Id.

The case of *Powell v. Myers*, 26 Wend. 591, above cited, decided by the court for the correction of errors, shows the extent to which these salutary rules have been enforced. There a passenger on a steamboat on the Hudson River from West Point to New York left the boat on its arrival at New York at about ten o'clock at night, its usual hour, leaving his trunk on board with the consent of the captain, and upon his assurance that it would be safe during the night. The next morning about eight o'clock the owner inquired for his trunk, and learned that it had been delivered to a negro on a forged order, the master of the boat pointing it out to him. The carrier was held liable. But in that case, Senator Verplanck remarked: "There may unquestionably be cases where, at some time after the arrival at the place of destination, the strict responsibility of the carrier as such for goods or baggage remaining in his possession undelivered, without fault or neglect of his own, should cease, and he would then continue to hold them, not as a carrier, insuring against all except public and inevitable perils, but as a mere bailee in deposit, gratuitously or otherwise, according to circumstances. Such a termination of the carrier's responsibility and change of character of the deposit would be regulated by usage, the course of business, sometimes by legal principles applied to the special facts, the acts of parties, and the common understanding of the transaction." The same learned jurist also suggested that the general rule governing such cases has not yet been distinctly and comprehensively laid down either in the decisions or the text-books, although the principle is to be found there.

The present case lacks the circumstances which controlled the decision in *Powell v. Myers*, *supra*, to wit, the consent of the carrier that the trunk should remain in his possession, and his delivery of it on a forged order. We are therefore to see whether there is any usage or legal rule applicable to the particular circumstances of this case which terminated the

strict responsibility of the defendants as carriers according to the principle suggested in *Powell v. Myers*, *supra*.

The usage relied upon by the defendants in respect to the delivery of baggage on the arrival of the cars was testified to by two persons only, and they were employees of the company. They did not state how long the usage had existed, or to what extent it was recognized by passengers; nor was any testimony given tending to show knowledge of it on the part of Dunn. It is true, one of the witnesses stated that the usage was "uniform," and the other that it was "universal," but the fact that large amounts of baggage were lying in the defendants' depot on the night in question, unclaimed by their owners, proved conclusively that the usage was neither universal nor uniform on the part of passengers. I think, therefore, it cannot be held that the responsibility of the carrier was at an end, on the ground of usage or of a known course of business, as was in the case of *Garside v. Trent and Mersey Navigation Co.*, 4 Term Rep. 581.

There are, however, certain legal principles applicable to the special facts of the case, which, it seems to me, obviously determine it in favor of the defendants. It must be conceded that in a case like the one before us, the owner ought not to be permitted to prolong the strict and rigorous liability of the carrier by refusing or neglecting to receive his baggage for an unreasonable length of time after the transit is ended. The obligations of both parties are, to some extent, reciprocal; the carrier is bound to deliver safely to each passenger his baggage at the place of its destination, in a reasonable time and manner, and when it is thus delivered or offered to be delivered, the passenger is bound to receive it and remove it in a reasonable time. If he refuses or neglects to do so, and the carrier thereafter retains it, unclaimed by the owner, his liability is changed from that of an insurer to the responsibility of an ordinary bailee, liable only for losses occasioned by his own fault.

It is claimed, however, by the plaintiff that the question of reasonable time is one of fact, and that the judgment of the justice is conclusive upon it. Ordinarily it is a mixed question of fact and law; when the testimony is conflicting, and the facts are unsettled, the jury are to decide, under the instructions of the court, as to the law; when there is no dispute as to the facts, the question is purely one of law, and the court should decide it: *Bryden v. Bryden*, 11 Johns. 187; *Carroll v.*

Upton, 3 N. Y. 272; *Hunt v. Maybee*, 7 Id. 266; *Dascomb v. Buffalo & S. L. R. R. Co.*, 27 Barb. 221; *Henbach v. Mollman*, 2 Duer, 259; *Cumpston v. McNair*, 1 Wend. 457. In this case, as has been already said, it was proved, without contradiction, that the carrier transported the passenger and his trunk to the place of destination, and was ready to deliver it on its arrival, but the passenger who accompanied it, and therefore had notice of its arrival, neglected to receive it, and left it in the carrier's possession,—not because it was unsafe or improper for him to take it, but because he preferred to leave it at the depot over night rather than carry it to his lodgings. His conduct was unreasonable, and the justice should have so held as matter of law upon the undisputed facts. By his neglect to remove the trunk, the subsequent liability of the defendants became that of an ordinary bailee, and they are not responsible for its loss, occasioned by an accidental fire, which did not occur from any negligence or fault on their part.

The rules above stated in respect to the obligations of passengers are laid down strictly in view of the special facts of this case. They are not intended to apply to the case of merchandise transported as freight, unaccompanied by its owner, nor to the case of the baggage of a passenger who, with the knowledge and consent of the agents of the railroad company, stops at an intermediate station on the route over which he has contracted to be carried, intending to pursue his journey on a subsequent train, and leaving his baggage in the keeping of the carrier in the mean time. The judgment of the superior court should be affirmed.

Judgment affirmed.

LIABILITY OF COMMON CARRIER FOR BAGGAGE OF PASSENGER: See *Dill v. South Carolina R. R. Co.*, 62 Am. Dec. 407, note 409. As to baggage deposited in warehouse, see *Minor v. Chicago etc. R'y Co.*, 88 Id. 670, note 671.

COMMON CARRIER'S LIABILITY TERMINATES WHEN: See collected cases in notes to *Wood v. Crocker*, 86 Am. Dec. 776; *Bansemer v. Toledo etc. R'y Co.*, 87 Id. 371.

COMMON CARRIER'S LIABILITY AS WAREHOUSEMAN COMMENCES WHEN: See notes to *Wood v. Crocker*, 86 Am. Dec. 776; *Bansemer v. Toledo etc. R'y Co.*, 87 Id. 371.

REASONABLE TIME OR OPPORTUNITY IN WHICH TO REMOVE GOODS AFTER TRANSIT IS ENDED: See *Wood v. Crocker*, 86 Am. Dec. 773, and note 777.

QUESTIONS OF FACT ARE DETERMINED BY JURY WHERE EVIDENCE IS CONFLICTING: *Louisville etc. R. R. Co. v. Collins*, 87 Am. Dec. 486; *Donaldson v. Mississippi etc. R. R. Co.*, 87 Id. 391; and it has been held that the

finding of facts must be left to the jury, even where the evidence is all on one side: *Birney v. New York etc. Tel. Co.*, 81 Id. 607.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The responsibility of a passenger carrier for the luggage of passengers continues until the owner has had reasonable time and opportunity to come and take away his baggage. If it be not called for within such reasonable time, the company may store it in a secure warehouse, and from thence its liability as a carrier ceases, and that of a warehouseman is assumed: *Chicago etc. R. R. Co. v. Boyce*, 73 Ill. 513; *Adams Ex. Co. v. Darnell*, 31 Ind. 23; *Fenner v. Buffalo*, 44 N. Y. 511; *Lamb v. Camden etc. Transp. Co.*, 2 Daly, 472, 473; *Burnell v. N. Y. Cent. R. R. Co.*, 45 N. Y. 187; *Fairfax v. N. Y. Cent. R. R. Co.*, 5 Jones & S. 532. Where a passenger on arriving at his destination neglects to look after his baggage, and negligently leaves it without any arrangement that the carrier shall retain it for him, and it is lost by fire or otherwise while thus situated, without fault on the part of the carrier, he is not liable: *Curtis v. Avon etc. R. R. Co.*, 49 Barb. 154; *Jones v. Norwich etc. Transp. Co.*, 50 Id. 205; *Holdridge v. Utica etc. R. R. Co.*, 56 Id. 192. But the difficulty is not in the rule as stated above, but in the determination of what is a reasonable time and opportunity for a passenger to claim and take away his luggage. The impossibility of stating any absolute rule on this subject has given rise to the apparent conflict in many of the adjudged cases. When the facts are undisputed, it is purely a question of law, and the court should decide it: *Chicago etc. R. R. Co. v. Boyce*, 73 Ill. 513; *Hedges v. Hudson River R. R. Co.*, 49 N. Y. 225; *Davis v. Gwynne*, 57 Id. 677; *Bennett v. Lycoming County Mut. Ins. Co.*, 67 Id. 278; otherwise the question must be left to the circumstances of each case, to be determined by the jury: *Burnell v. N. Y. Cent. R. R. Co.*, 45 Id. 186, 187; *Lamb v. Camden etc. Transp. Co.*, 2 Daly, 473. In *Burnell v. N. Y. Cent. R. R. Co.*, *supra*, Church, C. J., thought that the rule of exemption from strict liability was carried in the principal case "to the utmost limit of propriety, to say the least of it." A passenger's baggage, arriving at the end of the journey, and not called for until three days thereafter, is held by the carriers as warehousemen: *Weed v. Barney*, 45 N. Y. 347. The principal case was distinguished in *Curtis v. Avon etc. R. R. Co.*, 49 Barb. 154, because there the baggage was retained by the defendant on request until it could be sent for. The *dictum* in the principal case is no authority: *Chicago etc. R. R. Co. v. Boyce*, 73 Ill. 515.

BEISIEGEL v. NEW YORK CENTRAL R. R. Co.

[34 NEW YORK, 622.]

WANT OF CAUTION WHICH CONSTITUTES NEGLIGENCE MUST, IN ANY GIVEN CASE, DEPEND UPON CIRCUMSTANCES UNDER WHICH THE PLAINTIFF IS PLACED AT THE TIME.

PLAINTIFF, INJURED WHILE ATTEMPTING TO PASS OVER RAILROAD TRACK AT CROSSING, CANNOT RECOVER WHERE HE WAS HIMSELF NEGLIGENT. CASES INVOLVING THIS PRINCIPLE SUMMARIZED.

RAILROAD COMPANY IS BOUND TO EXERCISE MORE CAUTION AND HIGHER DEGREE OF CARE WHEN RUNNING THEIR CARS THROUGH A VILLAGE OR CITY THAN IN THE OPEN COUNTRY.

QUESTION OF NEGLIGENCE SHOULD BE SUBMITTED TO JURY where traveler, in attempting to cross a railroad track in a city, walked up to it, listened and looked, so far as the obstructed condition of the track would permit, to see if a train was approaching, but was run over by an engine going, contrary to law, at an unusual rate of speed, and without giving any warning of its approach.

ORDINARY CARE REQUIRES WAY-TRAVELER TO LOOK WHEN APPROACHING RAILROAD TRACK; but if he cannot see by reason of obstructions thereon, it requires him to stop just short of the track and listen.

OMISSION OF CUSTOMARY SIGNALS IS ASSURANCE BY RAILROAD COMPANY that no train is approaching crossing.

TRAVELER ON PUBLIC HIGHWAY AT RAILROAD CROSSING MAY RIGHTFULLY ASSUME that no train is approaching, where he sees none, and no flag is displayed, and no bell or whistle is sounded.

TRAVELER IN STREET OF CITY AT RAILROAD CROSSING, WHO SEES NO TRAIN APPROACHING, is not bound to be on alert for danger when the railroad company has assured him, by its omission to give the customary signals, that the crossing is safe.

NONSUIT. — It is error to hold as matter of law that plaintiff was guilty of negligence in not continuing to look both ways simultaneously, where he, in attempting to cross a railroad track in the street of a populous city, walked up to it, listened and looked, first one way and then the other, so far as the obstructed condition of the track would permit, but was run over, before he could clear the track, by an engine going, contrary to law, at a dangerous rate of speed, and without giving the customary signals of danger; and it is error to nonsuit him on that ground.

PLAINTIFF sued the railroad company for damages for negligently running a steam-engine against him while crossing the track on St. Joseph Street, in the city of Rochester. The court nonsuited the plaintiff at the circuit, upon the ground that it was his duty to have looked and ascertained, before attempting to cross the railroad, that he could safely pass the same, and that it was negligence in him not to do so. This order was affirmed at the general term, and from that judgment plaintiff appealed to this court. The facts are given in the opinion of Porter, J.

George F. Danforth, for the appellant.

Theron R. Strong, for the respondents.

By Court, MORGAN, J. Upon the undisputed facts of the case, the plaintiff could have avoided the accident by exercising a little more precaution before he stepped onto the third track. If the freight-cars had not intercepted his vision, he must have seen the engine approaching from the east in time to have avoided the collision.

It is said that common prudence required him to put him-

self in a position to see whether there was a train coming from the east on the third track before he attempted to cross it. The evidence, however, tended to show that the railroad company was guilty of great negligence in backing down at so rapid a speed, across St. Joseph Street, without any flagman to warn foot-passengers of their danger, or without sounding an alarm from the engine. With their cars standing upon the tracks so near the crossing, the company was guilty of inexcusable negligence in omitting to take the usual and necessary precautions to prevent accidents.

As an original proposition, it seems to me that the omission of a railroad company to sound an alarm when approaching a crossing, especially when the view is obstructed by intermediate objects, is some excuse for the inattention of a way-traveler to the danger of an approaching train. The way-traveler depends upon his ears as well as his eyes; and when his vision is obstructed, and he is within a few feet of the track, and hears no alarm, it ought not to be thought very hazardous to step across the track. If he hears no signal, he does not expect a train to cross his path when he has but a few feet to go to cross over; and if he, for greater precaution, stops and looks both ways before he makes the last step to reach the track, he exercises more precaution than a majority of our citizens do in similar circumstances.

The doctrine which requires a traveler in all cases to stop and look both ways when approaching a railroad track presupposes that railroad companies are guilty of violating their duties to such an extent as to make it a matter of course to expect a train to run over the streets of a city, under full headway, at any time, without signals or safeguards. When the vision is obstructed, as in the case at bar, the way-traveler generally listens to hear the alarm, and if none is given, it is not, or at least ought not to be, presumptuous in him to suppose that he can walk over the track with safety. He has a right to believe that the engineer will not run his engine with such dangerous speed without ringing the bell or sounding the whistle.

It is not sufficient to defeat this action to say that in another case the plaintiff was nonsuited because he failed to look both ways before attempting to cross the track of a railroad. The want of caution which constitutes negligence must, in any given case, depend upon the circumstances under which the plaintiff is placed at the time. If the tracks had been

clear, so that the plaintiff could have seen the approaching engine, then doubtless it would be negligence in him not to have seen it. So much must be conceded as settled by the adjudications in this state.

It is said the plaintiff ought to have known from the number of tracks that such a thing was very likely to happen as did happen in this instance, and as it happens probably very often. But this supposes that the railroad company very often backs down an engine upon their tracks across St. Joseph Street, in a crowded part of the city, at a rapid rate of speed, without a flagman at the crossing, and without giving any signal whatever of its approach. For if the usual signals are given, which the most ordinary prudence requires in such a case, it is not to be expected that such a thing will very often happen as did happen in this case. It involves a gross violation of duty on the part of the railroad company, and for that reason such a thing ought not to be expected by the way-traveler. The very object of requiring the engineer to sound an alarm before reaching the crossing is to put the way-traveler on his guard; and when the engineer neglects the necessary signals, he deprives the traveler of one of the means upon which he has a right to rely for protection against the danger of a collision.

The evidence tended to show that the plaintiff was within a few feet of the third track, and heard nothing to give him warning of an approaching engine. He left his position and stepped forward to cross it. He could not see the approaching engine until he had got to the very point of danger, and then, on account of the rapid motion of the engine, he was unable either to cross over or to recede and avoid it.

The court below maintains the proposition that the plaintiff, although he had waited on the second track until one train had passed and had heard no signal of another, yet, that he should have stopped again and looked down the third track before attempting to cross it. And this is put upon the ground that it might be expected that an engine at full speed would be rushing along at that very time without giving any warning of its approach. I cannot subscribe to such a proposition. It was, I think, a question for the jury to decide, whether under the particular circumstances of the case the plaintiff was wanting in ordinary prudence in attempting to cross the third track when he did without taking other precautions to discover that it was clear.

Doubtless if the engineer gives the usual signals, and the way-traveler does not hear them, it would be his misfortune if he came in collision with the engine. So if the way-traveler can see the train with his eyes in time to avoid it, it is his folly if he ventures to proceed and comes in collision with it. But when he cannot have the use of his eyes to discover the danger until he reaches the track upon which the train is approaching, and upon stopping a few feet short to listen he hears no signal, can it be said as an abstract proposition that the plaintiff is guilty of negligence because he trusts his ears and comes to the conclusion that it is safe to take the few steps necessary to pass over it? If he has listened while standing within a convenient distance of the track, and has heard no signal of an approaching train; if he has but a few steps to go to cross it; and if, acting upon the belief that it was safe (as nine men out of ten would do in a similar situation), he started on and was met by an engine running along almost noiselessly and at great speed,—can it be said with propriety that he should have expected such a thing to occur as did occur in this case?

It is not necessary to decide that the plaintiff was not guilty of negligence. All I claim is, that considering the peculiar position the plaintiff was placed in, as may be gathered from his own statement; his proximity to the track; the few moments it would take him to clear it; his obstructed vision, and the noise and confusion at the time; that no signals were sounded from the approaching engine to put him on his guard; and the unusual speed with which the engine approached him,—I say, considering all these circumstances, it should have been left to the jury, as a question of fact, to determine whether or not the plaintiff was guilty of negligence in attempting to cross the track without taking further and additional precautions against the danger of a collision. If, however, the evidence should disclose that the plaintiff was heedless or careless, and neglected to avail himself of the usual precautions which men of common prudence would use in like circumstances, he cannot recover, under the well-settled rule, that his own neglect contributed to produce the injury.

The degree of care which a way-traveler should observe when about to cross a railroad track has been discussed in several adjudicated cases. In *Pennsylvania R. R. Co. v. Ogier*, 85 Pa. St. 60 [78 Am. Dec. 322], it was held that negligence

was a relative term when applied to a traveler in such a case, and consisted in the absence of that ordinary care which a party ought to observe under the particular circumstances in which he is placed; and that a different degree of care is required when there is reason to apprehend danger from that which is necessary when none is to be expected. It is further held that a defendant cannot impute a want of vigilance to one injured by his act or negligence if that very want of vigilance was the consequence of an omission of duty on the part of the defendant.

In *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 66 [75 Am. Dec. 375], the same views were expressed, and it was held that the deceased was bound to exercise ordinary prudence, and no more; and it was for the jury to determine whether it appeared from the evidence that there had been on the part of the deceased a want of that care and foresight that men of ordinary prudence are accustomed to employ, placed in like circumstances: *Id.* 68. And in *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227 [85 Am. Dec. 700], it was held that crossing a railroad track without looking to see if a train is coming is not conclusive proof of want of care, although with nothing to explain or qualify the act it would be regarded as negligence. The plaintiff in that case followed the direction of the station agent to cross over; the path by which he went to the train was somewhat oblique, in that the engine which struck him came in a direction partially behind him. The court say: "Whether in this condition of things, his anxiety seasonably to reach the train, which would stop but a moment, the plaintiff, at a station with which he was not familiar, would have been likely to be thrown off his guard by the direction to cross over, given without any caution or qualification; whether, he might naturally, and without subjecting himself to the imputation of want of care, have considered himself under the charge of the defendant's agent, with an assurance that it was safe and proper to go directly to the cars,—were questions for the jury, and not for the court." The case shows that when he reached the outside of the platform he could see an approaching train at a distance of thirty or forty rods, but that he stepped off without looking that way, and did not hear the whistle until it was too late to escape the collision. Unless I am not entirely mistaken, there were more circumstances of excuse for the plaintiff in the case at bar than in the case of Warren.

The duty of a railroad company to exercise more caution and a higher degree of care when running their cars through a village or city than in the open country, as was held in *Fero v. Buffalo and State Line R. R. Co.*, 22 N. Y. 209 [78 Am. Dec. 178], concedes that the company would be liable in not exercising it, when by so doing ordinary prudence on the part of a way-traveler would save him from a collision. The good sense of the rule may be thus expressed: Ordinary care requires the way-traveler to look for a train when approaching a railroad track. If he cannot see by reason of obstructions, it requires him to stop just short of the track and listen. If he does more than this, it is extraordinary caution, and what is not required on the part of the plaintiff to entitle him to recover against a railroad company which has culpably omitted to sound an alarm before reaching the crossing, if the jury believe that the accident would not have occurred provided the usual signals had been given.

I distinguish the case at bar from those in this state where it has been held that the plaintiff could not recover in consequence of his own want of caution in attempting to cross a railroad track. In *Dascomb v. Buffalo and State Line R. R. Co.*, 27 Barb. 221, the plaintiff drove along upon the track without taking the slightest precaution to ascertain whether or not a locomotive was approaching. In *Mackey v. New York Central R. R. Co.*, 27 Id. 528, the deceased, after being notified of the approaching train, whipped up his horses and undertook to cross the track, when he was struck by the locomotive and killed. In *Sheffield v. Rochester and Syracuse R. R. Co.*, 21 Id. 339, the plaintiff was in plain sight of the track, with nothing to obstruct his view. So in *Steeves v. Oswego and Syracuse R. R. Co.*, 18 N. Y. 422.

In *Wilds v. Hudson R. R. Co.*, 24 N. Y. 435, it is assumed, in the opinion of the court, that the company complied with the requisition of the statute by ringing the bell so that it was heard at a distance sufficient, and in time sufficient, to give abundant notice to all persons to keep off the track. A flagman was also at the station, giving signals of the approaching train. This was, perhaps, sufficient to dispose of the case, without reference to the misconduct or negligence of the deceased; but the opinion proceeds to state that the deceased himself, after notice of the danger, whipped up his horses and attempted to cross the track. Under this state of facts, the court very properly decided that the defendants were not

liable. The action was tried again, and judgment of nonsuit ordered against the plaintiff. On appeal to this court, the judgment of nonsuit was affirmed: *Wilds v. Hudson River R. R. Co.*, 29 N. Y. 315. The opinion was delivered by Denio, C. J., in which he indulges in some observations which, I think, are liable to be misunderstood when applied to the case at bar. "If," he says, "the case is such as to require the person wishing to cross to come near the track to make his observation, that circumstance, so far from excusing him from the duty of looking at all, would only render that duty more imperative, if he would avoid the imputation of negligence."

I agree that it is the duty of a person who is about to cross a railroad track to make an observation before crossing; but in our cities, the vision is constantly obstructed by intervening obstacles, when it is often very difficult to see up or down the railroad track beyond the space of one or two buildings. However much we may speculate upon what should be considered prudence in such a case, our citizens walk over the track daily, depending upon their hearing more than they depend upon their eyesight to determine upon the propriety of crossing over it. If locomotives are run as they should be (and as I think they generally are in our cities), with moderate speed, it would be rarely, if ever, that a foot-passenger would be caught by an engine while walking over the track in such a case. But if an engine is running in such a case at full speed, without making any signals of danger, then doubtless there is no safety, except for the foot-traveler to stop at every point to obtain an observation until it is obtained, and then to run for his life until he is on the opposite side. If he can see both ways but twenty rods, and has but four rods to go to get over the track, it might be prudent, perhaps, for him to wait until he could see farther; for if trains are allowed to run at full speed in our cities, an engine of twenty rods distance might overtake him before he had time to clear the last rail on the opposite side. Indeed, it may be said with truth that in our cities it is safer in many cases to listen for signals than to attempt to see an approaching train by looking up and down the track.

It is not unusual for empty cars and freight-cars to stand upon the tracks near the crossings in our cities. Some have engines attached to them, and are waiting some signal to start; some have no engines attached. In the mean time, passenger trains are moving in and out, and a person who wishes to

cross the track is necessarily in some doubt as to the exact condition of things. His observation of the track is necessarily very limited, and the view he obtains quite unsatisfactory. There is often a curve in the track at a short distance from the crossing, so that he cannot see an approaching train without going quite a distance out of his way. In this condition of things, ought we to establish the rule that a foot-traveler is guilty of want of ordinary care and caution by attempting to cross without first obtaining an observation of the track at a distance sufficient to insure his safety against a locomotive advancing toward him at the rate of thirty or forty miles an hour? In my opinion, we ought to hold the railroad companies responsible in such a case if they run at too great a rate of speed to allow a man to clear the track who has approached it without being warned of the danger by the usual signals. When a man on foot reaches a point near the crossing, and listens and hears no signal or warning, I think he is not guilty of negligence for attempting to cross over the track in a case where he cannot see up and down the track by reason of obstructions. But I would not make the railroad companies liable for a collision in such a case where they run their locomotives with moderate speed, and make the usual signals before reaching the crossings.

We are to look at the case at bar as it appeared from the plaintiff's statement, and we must assume that the defendants ran their engine at a dangerous rate of speed without giving any signals of danger; that the plaintiff listened while standing upon the second track and heard no alarm; that he could not see the engine until he was about to step upon the third track, when it struck him before he could get out of the way. In this view of the facts, I think the court below erred in holding as a matter of law that the plaintiff was guilty of negligence. The judgment should be reversed and a new trial granted, costs to abide the event.

PORTER, J. The nonsuit seems to have been granted on the theory that a citizen who crosses a railway track at its intersection with a public highway is an absolute insurer of his own safety against the criminal negligence of a wrongdoer. It was sustained at the general term on the equally untenable theory that the plaintiff, who looked in each direction before crossing and saw no engine approaching, was guilty of culpable negligence in not continuing to look both

ways simultaneously. In either aspect, the decision was plainly erroneous.

The plaintiff owed no duty to the defendant beyond the exercise of ordinary care. The proof is clear, not only that he was free from negligence, but that he exercised more circumspection and care than most men would under similar circumstances. He was on the east side of St. Joseph Street, proceeding in a southerly direction, and on arriving at the crossing he observed the approach of a train of cars from the west on the fifth or southern track. He stopped at a safe distance and waited until the entire train had passed; he stood at the point where the second track crossed the sidewalk. This and the first or northern track, through some unexplained neglect of the company, were used as a place of deposit for empty freight-cars, eight feet in height, extending up to within three feet of the sidewalk, and thus obstructing in a considerable degree the eastern view of the tracks used by the trains. No other cars were in view, and there was no signal from any quarter of approaching danger. The flagman, whose duty it was to be at his post and display his flag when an engine was drawing near, or when from any cause the crossing was unsafe, did not appear to give the customary warning. It turned out, however, that at the moment the plaintiff resumed his way an engine, unencumbered with cars, was running rapidly backward from the east on the track next to that on which he had been standing. Its approach was so sudden and noiseless, that, although four of the witnesses stood on the south side of the crossing looking toward the north, and with nothing to obstruct their view, neither of them saw it until an instant before the accident. The plaintiff knew nothing of this, and his first step brought him within some four feet of the point where he was struck by the projecting fender of the engine, which, though veiled from view, must then have been within forty feet of him. At the first step he looked east, at the second west, and he was prostrated at the third. The whole affair was so instantaneous that he did not get to the track, but was knocked down before he reached it. After he started, less than two seconds intervened before his leg was crushed. All the witnesses swear that the engine was moving at a rapid rate of speed; all agree that the bell was not rung until after the accident.

Upon this state of facts, it is obvious that the gross negligence of the defendants' agents was the sole cause of the injury. The omission of the customary signals was an assurance

by the company to the plaintiff that no engine was approaching within a quarter of a mile on either side of the crossing. On this he was entitled to rely, and to the defendants he owed no duty of further inquiry. He was not bound to be on the lookout for danger when assured by the company that the crossing was safe. The views expressed in the case of *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9 [post, p. 761], decided at the present term, are equally controlling in this case. The judgment should be reversed and a new trial ordered.

Judgment reversed and new trial awarded.

NEGLIGENCE, NO ABSOLUTE RULE SHOWING WHAT CONSTITUTES; it depends upon the circumstances of each particular case: *Philadelphia etc. R. R. Co. v. Spearen*, 86 Am. Dec. 544; *Davis v. Winslow*, 81 Id. 573.

ONE INJURED WHILE ATTEMPTING TO PASS OVER RAILROAD TRACK AT CROSSING CANNOT RECOVER if he was himself negligent: *Butterfield v. Western R. R. Corp.*, 87 Am. Dec. 678, note 682; *Warren v. Fitchburg R. R. Co.*, 85 Id. 700, and note 706.

CAUTION REQUIRED OF RAILROAD COMPANIES IN RUNNING THROUGH CITIES, TOWNS, OR VILLAGES: *Philadelphia etc. R. R. Co. v. Hagan*, 86 Am. Dec. 541; *Pennsylvania R. R. Co. v. Ogier*, 78 Id. 322; *Fero v. Buffalo etc. R. R. Co.*, 78 Id. 178, and note 185.

QUESTION OF NEGLIGENCE IN CROSSING RAILROAD TRACK SHOULD BE SUBMITTED TO JURY WHEN: *Fox v. Sackett*, 87 Am. Dec. 682, and collected cases in note thereto 684; *Johnson v. Winona etc. R. R. Co.*, 88 Id. 83; *Warren v. Fitchburg etc. R. R. Co.*, 85 Id. 700, note 707; note to *Snow v. Housatonic R. R. Co.*, 85 Id. 731.

DUTY AND LIABILITY OF RAILROAD COMPANY TO TRAVELERS AT CROSSING—SIGNALS, WARNING, SPEED, FLAGMEN, ETC.: *Sweeney v. Old Colony etc. R. R. Co.*, 87 Am. Dec. 644, note 652, 653; *Wakefield v. Connecticut etc. R. R. Co.*, 86 Id. 711, note 715; *Philadelphia etc. R. R. Co. v. Hagan*, 86 Id. 541, note 544; *Chicago etc. R. R. Co. v. Still*, 71 Id. 236, collected cases in note thereto 239; note to *Philadelphia etc. R. R. Co. v. Spearen*, 86 Id. 552.

DUTY OF TRAVELER ATTEMPTING TO PASS OVER RAILROAD CROSSING to look out for approaching trains, etc.: *North Pennsylvania R. R. Co. v. Heilman*, 88 Am. Dec. 482; *Butterfield v. Western R. R. Corp.*, 87 Id. 678, note 682; note to *Sweeney v. Old Colony etc. R. R. Co.*, 87 Id. 652, 653; note to *Warren v. Fitchburg R. R. Co.*, 85 Id. 706, 707; note to *Pennsylvania R. R. Co. v. Ogier*, 78 Id. 327; collected cases in note to *Chicago etc. R. R. Co. v. Still*, 71 Id. 239.

NONSUIT FOR NEGLIGENCE SHOULD NOT BE GRANTED WHEN: See note to *Achtenhagen v. City of Watertown*, 86 Am. Dec. 772; *Creed v. Hartmann*, 86 Id. 341; *Deyo v. New York Cent. R. R. Co.*, 88 Id. 418.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Higher degree of care and caution is to be exercised by railroad companies in running their cars through cities and villages than in the open country: *Zimmer v. New York Cent. R. R. Co.*, 7 Hun, 554. And a young, sick, or aged person is entitled to more consideration when crossing a street than one in good health and under no disability: *Sheridan v. Brooklyn*

etc. R. R. Co., 36 N. Y. 43; S. C., 1 Trans. App. 53; *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 449. Such persons are not bound to exercise all the skill and all the care that the most capable and ready-witted person could command. Ordinary capacity and ordinary care and attention in protecting themselves is all that the law requires. This each is bound to give, whatever his age or condition; and if he fails, he cannot call upon others to supply his deficiencies, or to compensate him for loss arising from its absence: *Sheridan v. Brooklyn etc. R. R. Co.*, 36 Id. 43; S. C., 1 Trans. App. 53. In *Wilcox v. Rome etc. R. R. Co.*, 39 N. Y. 362, the principal case was cited as showing that where freight-cars were on one of the tracks, which interrupted the plaintiff's vision, and prevented his seeing the engine, he was not guilty of negligence in attempting to cross after looking both ways; but in the same case, p. 363, 364, it was said that the principal and other analogous cases depending upon the fact that the vision of the person killed or injured was obstructed by surrounding objects could not be regarded as definitely settling the principle that a neglect to give signals exonerates a person from liability when he fails to look, and has the means of seeing if he does look. The traveler approaching a crossing must be upon the lookout for danger. Ordinary care requires that he must look and listen to see if a train is in the vicinity, and if he fails in this, it is not merely evidence of negligence to be considered by the jury: it is itself such negligence as will prevent a recovery: *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 73; *Harty v. Central R. R. Co. etc.*, 42 N. Y. 473. The plaintiff's omission to look and listen in such cases, when by the use of those senses danger might be avoided, is concurring negligence, entitling the defendant to a nonsuit notwithstanding the neglect of the railroad servants to give signals: *Gorton v. Erie R'y Co.*, 45 Id. 664. But a nonsuit will not be sustained where the evidence as to plaintiff's negligence is conflicting: *Cook v. New York Cent. R. R. Co.*, 1 Abb. App. 436; S. C., 3 Keyes, 479; 3 Trans. App. 11; *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 449; *Sheridan v. Brooklyn etc. R. R. Co.*, 36 Id. 43; S. C., 1 Trans. App. 53. Conflicting evidence as to negligence must be left to the jury: *Cook v. New York Cent. R. R. Co.*, 1 Abb. App. 436; S. C., 3 Keyes, 479; 3 Trans. App. 11; *Sheridan v. Brooklyn etc. R. R. Co.*, 1 Id. 53; S. C., 36 N. Y. 43; *Artz v. Chicago etc. R. R. Co.*, 34 Iowa, 158. The verdict of a jury as to negligence will not be disturbed: *Indianapolis etc. R. R. Co. v. Hamilton*, 44 Ind. 82. Negligence is relative: *Gonzales v. New York etc. R. R. Co.*, 6 Robt. 300. The plaintiff must show negligence: *Dodge v. Burlington etc. R. R. Co.*, 34 Iowa, 279. If the plaintiff was negligent in attempting to cross a railroad, he cannot recover; if he was not, he may recover: *Artz v. Chicago etc. R. R. Co.*, 34 Id. 161. Railroad company is liable for an injury caused by its omission to ring the bell or sound the whistle, even in the absence of any statute requiring it, where there is no contributory negligence: *Artz v. Chicago etc. R. R. Co.*, 34 Id. 158. The law does not impose upon plaintiff the duty of stopping his team, getting down from his wagon, and going on or near the track on foot to look for the train; and the fact that he did not do so is no evidence of contributory negligence: *Duffy v. Chicago etc. R'y Co.*, 32 Wis. 275. The principal case was cited as supporting the principles upon which the following cases were decided, viz.: *Sheridan v. Brooklyn etc. R. R. Co.*, 36 N. Y. 43; S. C., 1 Trans. App. 53; *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 449; *Cook v. New York Cent. R. R. Co.*, 3 Trans. App. 11; S. C., 1 Abb. App. 436; 3 Keyes, 479.

PASSINGER v. THORBURN.

[34 NEW YORK, 634.]

ON BREACH OF SPECIAL WARRANTY, PLAINTIFF IS ENTITLED TO SUCH DAMAGES as were the natural and necessary consequences of the breach.

MEASURE OF DAMAGES WHEN THING SOLD WITH WARRANTY DOES NOT ANSWER WARRANTY is the difference between the actual value and the value that the article would have possessed if it had conformed to the warranty.

WHERE DEFENDANT SOLD CABBAGE-SEED, AND WARRANTED THEM TO PRODUCE BRISTOL CABBAGES, which warranty was false, it was held that the damages would be the value of a crop of Bristol cabbages such as ordinarily would have been produced that year, deducting the expense of raising the crop, and also the value of the crop actually raised therefrom.

WHERE ARTICLE IS SOLD WITH WARRANTY, AND VENDEE RESells WITH LIKE WARRANTY, the sum paid by him in an action by his sub-vendee for a breach of that warranty is *prima facie* evidence of the amount which he will be entitled to recover from his vendor in an action in his own behalf.

THE facts are stated in the opinion.

A. J. Parker, for the appellant.

S. Hand, for the respondent.

By Court, DAVIES, C. J. This is an action brought to recover damages for a breach of warranty. The plaintiff purchased of the defendant a quantity of cabbage-seed, and according to the facts as found by the jury, warranted the same to be Bristol cabbage-seed, and that such seed would produce Bristol cabbages. The jury found that it was not Bristol cabbage-seed, and that it did not produce Bristol cabbages. The judge charged the jury that if the warranty was untrue, then the plaintiff would be entitled to such damages as were the natural and necessary consequence of the breach; that the damages would be the value of a crop of Bristol cabbages such as they should believe would ordinarily have been produced that year, deducting all expense of raising the crop, and also deducting the product or value of the crop actually raised. The jury found a verdict for the plaintiff, and judgment thereon was affirmed at general term, and the defendant now appeals to this court. The question presented for decision is, whether rule of damages laid down for the government of the jury is the correct one. The fact and nature of the warranty and the breach thereof are disposed of adversely to the defendant by the verdict of the jury.

The rule upon this subject, as stated by Lord Campbell in
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Smeed v. Ford, 1 El. & E. 602, is found in *Hadley v. Baxendale*, 9 Ex. 341, where it is laid down, in accordance with the Code Napoleon, with Pothier, with Chancellor Kent, and with all other authorities, that the damages which one party to a contract ought to receive in respect of a breach of it by the other are such as either arise naturally, that is, in the usual course of things, from the breach itself, or such as may reasonably be supposed to have been contemplated by the parties when making the contract, as the probable result of the breach. Sedgwick on Damages, p. 290, says it seems originally to have been held that the measure of damages when the thing sold with warranty did not answer the warranty was the difference between the price paid and the actual value; but it is now well settled that the rule is the difference between the actual value and the value that the article would have possessed if it had conformed to the warranty. The same rules are enunciated by Selden, J., in delivering the opinion of the court in *Griffin v. Colver*, 16 N. Y. 489, when he says: "Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not. The broad general rule is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject but to two conditions: the damages must be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract,—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."

The following cases illustrate the application of these rules: *Borradaile v. Brunton*, 8 Taunt. 535, was an action to recover damages for a breach of warranty in the sale of a chain cable. The defendant sold to the plaintiff a chain cable as a substitute for a rope cable of sixteen inches for the use of the plaintiff's ship, and warranted the chain cable should last two years; that the plaintiff used the chain cable from time to time until it broke, and that, in breach of the warranty, the chain cable did not last two years as the substitute for the rope cable; but on the contrary, within the two years, and while the plaintiff's ship was held by the chain cable, one of the links thereof broke, and thereby the chain cable and an anchor of the plaintiff to which it was affixed were wholly lost to the plaintiff. The jury found for the plaintiff the value as

well of the lost anchor as of the cable. On motion for a new trial, it was contended that the plaintiff could not recover for the loss of the anchor as for a loss consequent on the failure of the cable; for though the anchor followed the insufficient cable, yet this was a consequence to which the warranty did not extend, for the cable only was warranted. Dallas, C. J., said the defendant warrants the cable sufficient to hold the anchor, and it is found not to be sufficient; the holding of the anchor by the cable is of the very essence of the warranty. Park, J., said the use of the cable is to hold the anchor; upon the breaking of the link, the cable became insufficient to hold the anchor, and the pilot then ordered it to be slipped, in the exercise of a prudent discretion, to save both ship and cargo.

In *Page v. Pavey*, 8 Car. & P. 769, the plaintiff sued for a breach of warranty in the sale of wheat. The declaration alleged a sale of old cone wheat for seed, with a warranty that it would grow, and a breach that it did not grow, whereby the wheat became of no value to the plaintiff, and he was deprived of great gains which would have arisen from the straw and corn which would have been produced if it had grown; and it was held that the plaintiff could give evidence of what the value of the crops might have been, with a view to make out his damages claimed in his declaration.

Jones v. Bright, 5 Bing. 533, was an action for damages on sale of copper for sheathing a ship. The case was decided on the ground that there was an express warranty that the copper sold would answer the purpose for which it was purchased; it did not, and plaintiff recovered. Best, C. J., said: "In a contract of this kind, it is not necessary that the seller should say, I warrant; it is enough if he says the article which he sells is fit for a particular purpose. Here, when Fisher, a mutual acquaintance of the parties, introduced them to each other, he said, 'Mr. Jones is in want of copper for sheathing a vessel'; and one of the defendants answered, 'We will supply him well.' That constituted a contract, and amounted to a warranty." Again, the chief justice observes: "If a man sells a horse, generally he warrants no more than that it is a horse; the buyer puts no question, and perhaps gets the animal the cheaper. But if he asks for a carriage-horse, or a horse to carry a female or a timid or infirm rider, he who knows the qualities of the animal, and sells, undertakes on every principle of honesty that it is fit for the purpose indicated. The selling upon a demand for a horse with particular qualities is

an affirmation that he possesses these qualities. So it has been decided if beer be sold to be consumed at Gibraltar, the sale is an affirmation that it is fit to go so far."

In *Brown v. Edgerton*, 2 Man. & G. 279, the defendant was applied to to furnish a rope for a crane, to be used for the purpose of hauling up and letting down pipes and other heavy casks. The defendant undertook to supply the rope for the plaintiffs' crane, and the jury found the rope was not fit for that purpose. The rope broke, whereby the plaintiffs lost a pipe of wine which was being raised by it. The defendant was held liable for the damages occasioned for the breach of the warranty that the rope was fit for the purpose for which it was purchased. Maule, J., said: "The evidence given in the case satisfactorily showed that the defendant undertook to furnish a rope which would fit the crane and raise the pipes of wine. The jury having found that the rope was an unfit one for that purpose, the defendant has been guilty of a breach of the implied warranty alleged in the declaration."

The case of *Randall v. Raper*, El. B. & E. 84, is in many particulars like the case at bar, and deserves a careful consideration. The declaration charged that the defendant, by warranting thirty quarters of seed barley to be chevalier seed barley, sold the same to plaintiffs, and averred that said seed barley was not chevalier seed barley; that said plaintiffs, having purchased said seed barley for the purpose of reselling, did, without having any notice or knowledge of said breach of warranty, and believing said seed barley to be chevalier seed barley, resell the same, warranting it to be chevalier seed barley, when in fact it was not chevalier seed barley, and that the buyers had sowed the same without notice of that fact in their respective lands as and for chevalier seed barley, and the same, not being chevalier seed barley, yielded and produced much less and inferior crops, and crops of an inferior quality of barley than the same otherwise would have done had the same been chevalier seed barley. It was agreed that the difference in price between chevalier seed barley and the seed barley delivered was £15, and that the loss to the parties who had purchased from the plaintiffs by reason of the difference in their crops was in all £261 7s. 6d. These purchasers had made claims upon the plaintiffs for compensation, and the plaintiffs agreed to satisfy them. A verdict was taken for £261 7s. 6d., with leave to the defendant to move to reduce it to £15. The rule was refused. Lord Campbell said: "I am

clearly of opinion that in case the plaintiffs had paid the damages sustained by their vendees, being compelled to do so for breach of a warranty similar to that given by the defendant to the plaintiffs, they would have been entitled to recover such damages as special damage in this action. It was a probable, a natural, even a necessary consequence of this seed not being chevalier seed barley that it did not produce the expected quantity of grain. That is a consequence not depending upon the quality of the soil, but one necessarily resulting from the contract as to the quality of the seed not being performed." Erle, J., said the question is, What amount of damages is to be given for the breach of this warranty? The warranty is, that the barley sold should be chevalier barley. The natural consequence of the breach of such a warranty is, that the barley which has been delivered having been sown, and not being chevalier barley, an inferior crop has been produced. This damage naturally results from the breach of the warranty, and the ordinary measure of it would be the difference in value between the inferior crop produced and that which would have been produced from chevalier barley. Crompton, J., said: "Taking the narrowest rule as to the probable and necessary consequences of a breach of contract, these damages fall within it." And all the judges held and agreed that the plaintiffs were entitled to recover the damages sustained by their vendees upon a breach of the warranty.

This is the well-settled law in this country, it having been held that where an article is sold with a warranty, and the vendee resells with a like warranty, the sum paid by him in an action by his sub-vendee for a breach of that warranty is *prima facie* evidence of the amount which he will be entitled to recover from his vendor in an action in his own behalf: *Reggio v. Braggiotti*, 7 Cush. 166; *Armstrong v. Perry*, 5 Wend. 535; *Blasdale v. Babcock*, 1 Johns. 518. And this court, in *Muller v. Eno*, 14 N. Y. 597, held that a purchaser may recover for a breach of a warranty although he has sold the goods and no claim has been made on him, and that it was not necessary for him to show the price on the resale. That price may be evidence of the damages, but does not furnish the rule in respect to them.

In *Smeed v. Ford*, *supra*, the question, what damages the plaintiff was entitled to recover on failure to deliver a thrashing-machine according to contract, Lord Campbell observed that the defendant knew that the plaintiff required the ma-

chine for the purpose of thrashing wheat in the field. Then was it not contemplated by the parties that if the machine was not delivered by the time fixed damage to the wheat would in all probability be the result, particularly in such a variable climate as this? Owing to the non-delivery of the machine, the wheat was stacked, and afterward damaged by the rain which ensued. This injury, and the loss and expense which it involved, were the natural results of the defendant's delay; they were also results which the parties must have foreseen. Crompton, J., adopts the rule that damages which may reasonably be supposed to have been contemplated by the contracting parties are damages which naturally arise from a breach of the contract. He adds: "I doubt whether in this case it is the duty of a judge to lay down more to the jury than that the plaintiff is entitled to such damages as are the natural consequences of the breach of the contract. The question what are such natural consequences is, I think, in such case rather for the jury than for the judge, just as it is for them, not for him, to assess the amount of the damages."

In the present case, it cannot be doubted that the damages which this plaintiff has sustained are such as arise naturally from the breach of the defendant's warranty. His engagement was, that the seed he sold was Bristol cabbage-seed, and would produce Bristol cabbages. It may therefore have been reasonably supposed to have been in the contemplation of the parties that if the seed was not Bristol cabbage-seed, and would not consequently produce Bristol cabbages, that damage would necessarily accrue to the plaintiff, and would be a natural consequence of such breach. The jury have so said in this case, and we think they came to a correct conclusion.

The plaintiff, in establishing the warranty and its breach, was entitled to a full indemnity. In the language of Chief Justice Shaw in *Reggio v. Braggiotti*, *supra*, "in this country the established rule in relation to damages in actions of this nature is, that the plaintiff may recover what he can show that he has actually lost. If the article is wholly worthless, then he shall recover what would have been its value to himself at the time of the warranty had it corresponded to the terms of the warranty." In the case of *Cary v. Gorman*, 4 Hill, 625, Mr. Justice Cowen observed: "A warranty on the sale of a chattel is in effect a promise that the subject of sale corresponds with the warranty in title, soundness, or other quality to which it relates. It naturally follows that if the

subject prove defective within the meaning of the warranty, the stipulation can be satisfied in no other way than by making it good. That cannot be done except by paying the vendee such sum as together with the cash value of the defective article shall amount to what it would have been worth if the defect had not existed." That the measure of damages on a breach of warranty in the sale of goods is the difference between the value of goods if they had corresponded with the warranty, and their actual value as they in part were. This rule rests upon sound principles, and is settled by the two carefully considered cases of *Voorhees v. Earl*, 2 Id. 288 [38 Am. Dec. 588], and *Cary v. Gorman*, 4 Id. 625. It follows, therefore, that the rule of damages as laid down by the learned justice who tried this action in his charge to the jury was correct, and the exceptions thereto cannot be sustained.

The counsel for the appellant insists that the judge at the circuit erred in refusing to charge that the contract must be the result of the minds of both parties meeting and agreeing, and unless the defendant intended to make a contract that he would pay for the crop in case of its failure because of the bad quality of the seed, he cannot be made liable to such damages. To the refusal to charge both branches of this proposition there is a general exception. If the counsel had intended to designate the contract of warranty as that upon which the minds of the parties must have met, he was undoubtedly correct in the position; but this is evidently not what he meant. He alludes to the contract mentioned and referred to in the second branch of his proposition; that is, unless the defendant intended to contract that he would pay for the crop in case of failure of the seed to produce the crop warranted, he cannot be made liable in damages. The authorities cited are abundant to show that the defendant must be held responsible for the natural consequences of the contract which he did make, and the legal responsibilities following therefrom, whether he intended to be so liable or not. Ignorance of the law and of the legal effect of the contract made by him cannot excuse him from its performance. The law assumes that both parties entered into the contract with full knowledge of the legal rights and duties resulting therefrom, and whether either of them intended to be thus bound cannot be a subject of proper inquiry. The judge therefore justly refused to charge as requested.

The supposition of the defendant as to the use the plaintiff intended to make of the seed was wholly immaterial. The de-

defendant's liability is to be tested by the fact whether he made the warranty, and whether there was a breach; and the extent of that liability, if these two preliminary positions are established, was what sum was necessary to compensate the plaintiff for the loss he had sustained by the article sold not being of the quality warranted. The judge therefore properly refused to charge that the extent of defendant's liability, or the rule of damages to be applied, depended in any manner upon the supposition of the defendant as to the use the plaintiff intended making of the thing sold. Upon the principles discussed and the authorities cited, there was no error committed in the admission of evidence. The judgment must be affirmed, with costs.

Judgment affirmed.

MEASURE OF DAMAGES FOR BREACH OF WARRANTY when thing furnished does not correspond with that called for by the contract: *Fisk v. Tank*, 78 Am. Dec. 737, note 751; note to *Voorhees v. Earl*, 38 Id. 592; extended note to *Cary v. Gorman*, 40 Id. 303-306, citing the principal case; *Gant v. Hunsucker*, 55 Id. 408; note to *Tuttle v. Brown*, 64 Id. 83.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Where a thing has been sold for a particular purpose, and with a special warranty for that purpose, the vendee, in case of breach, is entitled not only to recover such damages as are the natural and necessary consequences of the breach: *People v. Mayor etc. of Albany*, 5 Lana. 529; *Dung v. Parler*, 3 Daly, 97; but such damages as may fairly be deemed to have been contemplated by the parties as the probable result of the breach may be recovered: *Rich v. Smith*, 34 Hun, 137; *Flynn v. Hatton*, 43 How. Pr. 348; *Kemp v. Knickerbocker Ice Co.*, 51 Barb. 42; *Baldwin v. United States Tel. Co.*, 1 Lana. 138; *Parks v. Morris Aze and Tool Co.*, 54 N. Y. 592, 593. These citations show that this rule of damages has been applied in various classes of cases. Gains prevented, as well as losses sustained, may be recovered as damages for a breach of the contract, where they can be rendered reasonably certain by evidence, and have naturally resulted from the breach: *White v. Miller*, 71 Id. 132, 133; *Schutt v. Baker*, 9 Hun, 557; *Draper v. Sweet*, 66 Barb. 147. Where it is shown that the contract with the defendant was entered into for the express purpose of enabling the plaintiff to fulfill a previous contract made by himself with another party, or where the defendants had notice of the use to which the commodity they agreed to supply was to be put, or of a contract for a resale of it, then the loss of profits is to be deemed the damages which are the natural consequence of the breach of contract, and such as the parties had in contemplation as the probable result of such breach: *Booth v. Spuyten Duyvil Rolling Mill Co.*, 3 Thomp. & C. 372. But the right of a party to damages for the breach of a contract is limited to such as are the natural and proximate consequence of the act complained of, and do not include those proceeding from his own neglect or mismanagement: *Smith v. Pettee*, 7 Hun, 335. If a vendor sells property, and warrants it to be suitable for a specific purpose, and it is applied to that purpose, and proves to be in whole or in part unfit for such purpose, he is liable for the

difference in value between the article as it actually is and what its value would be if it corresponded with the warranty: *Draper v. Sweet*, 66 Barb. 147; *Park v. Morris Axe and Tool Co.*, 60 Id. 143; S. C., 41 How. Pr. 20; 54 N. Y. 592, 593; 4 Lans. 105. But the plaintiff is not confined to the recovery of this difference alone, but may recover damages directly consequent on the breach, and fairly to be deemed in the contemplation of the parties: See case last cited, as decided in the court of appeals; also *Van Wyck v. Allen*, 69 N. Y. 67-69. But cases in which there is nothing more than a general warranty of quality must be distinguished from the principal one, for the rule of damages for the breach of such a warranty is the difference between the value of the goods if they had corresponded with the warranty and their actual value. And where there is no special warranty that the thing sold is fit for a specific use, there can be no damages allowed beyond this rule, as there may be where the warranty is specific: *Hoe v. Sanborn*, 36 Id. 98; S. C., 35 How. Pr. 204; 3 Abb. Pr., N. S., 195; *Whitney v. Taylor*, 54 Barb. 539; *Edwards v. Collson*, 5 Lans. 328; *Brown v. Tuttle*, 66 Barb. 178, 179. The principal case was approved and followed in *White v. Miller*, 71 N. Y. 132, 133; *Milburn v. Belloni*, 39 Id. 54, 55; *Van Wyck v. Allen*, 6 Daly, 388; *White v. Miller*, 7 Hun, 438, 439. In *Flick v. Wetherbee*, 20 Wis. 396, it was cited to the point that the lessor of farming land who has covenanted to supply the seed is bound to furnish good seed. It was referred to in *Albert v. Bleeker Street etc. R. R. Co.*, 2 Daly, 394, and commented upon in *Van Wyck v. Allen*, 69 N. Y. 67-69, showing that the principal case was correct as far as it went, but that it did not undertake to fix the limits of the rule on all sides.

ERNST v. HUDSON RIVER RAILROAD COMPANY.

[35 NEW YORK, 9.]

IN DETERMINING PROPRIETY OF NONSUIT, COURT WILL ASSUME truth of facts which plaintiff's testimony legitimately conduced to prove, though their correctness be controverted by defendant's witnesses.

PERSON WHO ON PUBLIC HIGHWAY APPROACHES RAILWAY TRACK, and can neither see nor hear any indication of a moving train, is not chargeable in law with negligence for assuming that there is no car sufficiently near to make the crossing dangerous.

IF STATUTORY WARNING OF APPROACHING TRAIN BE NOT GIVEN, a traveler upon the public highway has a right to assume that the crossing is safe, and is not bound under the circumstances to be on the alert for danger. If, however, he have actual notice of the approaching train in any other manner, he is not excused from the exercise of all due care to avoid the train.

ACTION OF TRAVELER ON HIGHWAY IN ATTEMPTING TO CROSS RAILROAD TRACK without looking up and down for approaching trains is divested of its character of concurrent negligence in law by the fact that the engineer of the train omitted to give the statutory signal or any other warning.

ACTION by the widow of Henry Ernst for damages for negligently killing her husband by colliding with his wagon while he was attempting to cross defendant's track. On a former

trial, a verdict was given for plaintiff, which, however, was reversed on the ground that concurrent negligence had been shown. There were various discrepancies between the testimony on the former and upon this trial, which are stated in the opinion. The evidence given on the trial is sufficiently stated in the opinion. The facts shown on the trial were these: Decedent, a sober and industrious man, accustomed to the use of horses for many years, and familiar with the railroad and signals used at the place of the injury, was driving down Rensselaer Street to the ferry-landing at its foot. To reach the ferry, he had to cross defendant's track at its intersection with said street. Before doing so, he stopped at Dearstyne's Hotel to warm himself. This hotel was 112½ feet from the railroad track, and another 100 feet from the ferry. The railroad station-house obstructed the view of the track on the north side, — the direction from which the train which killed decedent came. As he started from Dearstyne's Hotel, decedent had a full view of the track for twenty rods north of the crossing. As he approached, first at a walk and then at a slow trot, he saw no train in view, and he also saw that there was no flagman at the crossing. He therefore started to cross the track, being urged to come on by signs from the boatman, who was waiting for him. Just then the train emerged from behind the station-house and ran into decedent's team, causing injuries from which he died. It appeared that the station was one for a flagman, but that no flagman was there; also that neither bell nor whistle were sounded as the train approached the crossing. The remaining facts appear in the opinion.

Parmenter, for the appellant.

Reynolds, for the respondent.

By Court, PORTER, J. When this case was here on a former occasion, a new trial was granted on the ground that a nonsuit had been refused upon a state of facts of the truth of which there is now no pretense. That decision is unreported in the regular series; but one of the opinions delivered in this court is contained in another law publication: 24 How. Pr. 97. In that report, through some misapprehension or oversight, the head-notes, as well as the preliminary statement of facts, are essentially erroneous. The body of the opinion, however, discloses a very striking difference in the evidence as then and as now presented on the vital question, whether the hus-

band of the plaintiff was a negligent and guilty participant with the defendant in the wrong which resulted in his death. We find the difference still more marked on examining the printed cases upon which the decision of this court was founded.

It seems that the plaintiff was surprised on that trial by proof which she probably had no reason to expect, but which was not repeated on the last trial, when she was prepared with evidence to meet it. The prevailing opinion assumes—and we are at liberty and perhaps bound to suppose that the testimony of Simmons, Butler, and Waltemyre, whom the defendant did not call on the last trial, justified the assumption—that Ernst was intoxicated on the occasion of the collision; that he drove so carelessly by the way that he nearly tipped over; that he was cautioned at the time by the person riding with him to drive more carefully; that he was partially deprived of the use of his ordinary faculties; that he knew the stated times for the passage of the trains; that this was in fact a regular train on its stated and customary time; that it was notoriously due at that hour; that Dearstyne's Hotel, at which Ernst stopped, was 150 feet east of the track; that he started from there at a rapid rate of speed; that other persons heard the train coming at quite a distance; that four of them, after he had started from the tavern, respectively called to him in a loud voice to stop, several times each; that quite a number of persons saw the approach of the train; and that he had an open view of it nearly all the way from the hotel to the crossing, for a distance of a hundred rods from the highway on which he was riding: 24 How. Pr. 102, 108, 110.

In the light of the evidence given on the last trial, it is not difficult to infer why testimony like this was not reproduced when the plaintiff was prepared to meet it. Simmons, one of those witnesses, swore there was a box on the testator's sleigh, and a seat on the box; represented, in substance, that this intoxicated man, who had been running his horses, and drinking at every tavern, had his head as well as his face bundled up in a big shawl; that he himself heard the cars coming, and standing near the track face to face with Ernst when the latter was half-way down from the tavern, told him to stop for God's sake, or he would be killed. It appears that Butler on that occasion swore with equal zeal; his version of the matter in substance was, that he stood at the northwest corner of Broadway and Rensselaer streets; that he hallooed

from there to Ernst as he was passing to hold on; that the testator appeared to hear him, but turned his head away, and in defiance of the warning, drove onto the crossing. Waltemyre on that trial went further still, and in effect represented Ernst as driving his horses on the track directly in front of the engine, though warned of its approach by the whistle, the bell, and the flagman. The testimony of these three men, then given and now withheld, explains the former decision that upon such a state of facts the plaintiff should have been nonsuited. It also explains why that decision was by a divided court. Such testimony, though not met by a point-blank contradiction, was too improbable in its nature, and too inconsistent with the other facts proved, either to obtain credence with the jury or to commend itself to the full confidence of practiced jurists. It happened that the case upon the testimony as then given was heard in this court and the court below by ten of the judges, only five of whom differed in their conclusions on the question of fact from the jury. It is scarcely to be supposed that they would have hesitated to approve the verdict if it had been rendered upon the proof presented by the respective parties on the subsequent trial.

It now appears that the prominent facts then relied on to inculcate the testator were fictitious. Instead of being a drunkard, stupefied or crazed with liquor, he is proved to have been an orderly, sober, and respectable citizen. The pretense that he drank anywhere that morning is abandoned, and his family physician testifies that he never knew him to be intoxicated. Instead of being deprived of the use of his faculties, he is shown to have been a man in the prime of life, of regular habits, with clear vision, and in perfect health. Instead of running his horses by the way, and starting from the tavern with reckless speed, he is shown to have been an experienced and practiced driver; and it is proved that on this occasion he started from the hotel on a walk, and continued to drive with moderation, prudence, and judgment. The claim that he knew the stated times of the trains is also abandoned. The fact that this was a regular train on its customary time is alleged by none, even of the defendant's witnesses, except Gregory, the engineer; and he is contradicted by Dearstyne, an intelligent and disinterested witness, who knew the time of the trains, waited for them with his ferry-boat, and observed the fact at the time that this was a train not then due. The

defendant, knowing the fact to be in issue, neither produced its time-tables nor confirmed Gregory's statement by the testimony of any of its other employees. The absence of the flag-man from his post is strong presumptive evidence that no train was due at that hour. Under such circumstances, no court has a right to assume as matter of law that the statement of the inculpated and impeached engineer is true, and that the contradictory testimony of a reliable and disinterested witness is false.

It now appears that instead of the testator's riding 150 feet in full view of the engine, the whole distance from the hotel to the track is less than 113 feet, and that he did not see the engine at all until it emerged from behind the station-house, when the horses were in the very act of going upon the crossing. It also appears that instead of his having from the hotel down, except opposite the station-house, an open view of the northern track for 100 rods, there was but one place in the whole distance where, even if he had been standing up and expecting a train, he could have seen it as far north as the ice-house, which was within 594 feet of the crossing. The track, instead of being straight, was sharply curved; the view, instead of being open, was obstructed by intervening woods and upland. The natural point of observation, when there was no signal of an approaching train, would be at the corner of Rensselaer Street, as he turned his horses round to the north and drove into it from Broadway. The proof is explicit that from that point the range of vision is but about twenty rods, and it is equally decisive that when he was at that point the engine was behind the hill and woodland, at least fifty-seven rods above the crossing. Ernst, as he drove down, was sitting on the bottom of his sleigh, which had no box; this of course materially narrowed his range of vision, and made every intermediate fence an additional obstruction to the view.

There is no pretense now that any one east of the store, which adjoins the track, either saw or heard the train at all until it reached the crossing. Ten Eyck and Hunter were at the store, within two or three rods of the rails; both of them were looking north, and both unoccupied; yet neither of them saw or heard the engine until it was within less than two hundred feet of them, the horses of Ernst being then close to the track, and in full motion. It was not seen at all by the witnesses Taylor, Traver, Dearstyne, and Van Denburgh until just before it reached the crossing; and none of them heard it

until then, except the ferry-man, who was more familiar with the sound, and who detected it first while looking in that direction from below on the river side when the cars were within three hundred feet.

The claim that four men were hallooing to Ernst to stop when he was not yet half-way down is also now abandoned. But two men hallooed at all, one from the store, and one from the station-house, while the team was passing between them. If Ernst heard what either of them said, the fact is undisputed that no one else did. The warning was well meant, but it came too late; it was simultaneous with the *res gestæ*,—with the rush of the engine, the plunge of the horses, and the ineffectual struggle of the testator to rein them back.

The proof is clear and decisive that the bell was not rung, nor the whistle blown, until after the collision. Only two of the defendant's witnesses claimed that they were; and they were the two employees whose neglect of that duty cost Ernst his life; one of them was a mere boy. Both were impeached on material points by their own oaths before the coroner's jury. They had officiated some two months before as engineer and fireman when Wilds was killed. They were specifically contradicted as to the whistle and the bell by two of the defendant's and five of the plaintiff's witnesses, and they were confirmed by nobody.

On the last trial, it also appeared that this was a flag-station; that it was the known and uniform practice of the company whenever there was a train advancing within eighty rods of the crossing on either side to give notice to the public of its approach by exhibiting at that point a white flag if the engine was to stop, and a red flag if it was to pass without stopping. There was neither flag nor flagman at the crossing; and thus the practice which was adopted for the security of the traveler was converted on this occasion into a snare for his destruction.

On this state of facts, there was nothing to justify the imputation of culpable negligence to the testator; and most manifestly there was nothing to warrant a court in adjudging his guilt as matter of law without the intervention of a jury.

In determining the propriety of a nonsuit, we are legally bound to assume the truth of the facts which the testimony of the plaintiff legitimately conduced to prove, though their correctness be controverted by the defendant's witnesses: *Colegrove v. New Haven and Harlem R. R. Cos.*, 20 N. Y. 492 [75

Am. Dec. 418]; *Merritt v. Lyon*, 3 Barb. 110. It is the appropriate province of the jury to deduce inferences of fact, and to weigh doubtful or conflicting evidence.

The testator was lawfully upon the public highway; the right he had to use it was as perfect as that of the defendant to cross it. In the exercise of his legal privilege, he did not expose others to injury, and was charged with no duty of extraordinary vigilance. The defendants exercised theirs with agencies imminently perilous to human life, and they were under a correlative obligation to use them with the highest degree of care. As the highway was never dangerous except when they made it so by driving their engines across it, and as they never crossed it without some degree of jeopardy to the wayfarer, the law provided for the security and protection of the citizen by requiring the defendants to give special and public warning whenever their engines approached the crossing.

The rights of the people of Rensselaer in their own highways are not subordinate to those of the railroad company. If the traveler is warned of the approach of an engine by the customary signals, or if by other means he is made aware of its proximity, it is his duty to avoid exposing himself to injury. If he advances on the open highway, with no cars in view, and no indications of their approach, either by signal or otherwise, he is at liberty to pursue his way without incurring the imputation of breach of duty to a wrong-doer.

The only condition of the right to redress for a wrong of this description is that the party aggrieved be free from culpable negligence; and he is not chargeable with such negligence unless he fail to exercise ordinary care and vigilance to avoid the injury of which he complains. There has been some diversity of judicial opinion as to what ordinary care and vigilance demand of a party upon a given state of facts; but that this is the uniform standard by which to test the right of the plaintiff has been too often adjudged to be open to further discussion. The rule is simple, practical, and easy of application. "The question is," as this court said when the case was before it on a former occasion, "What would a majority of men of common intelligence have done under like circumstances?" *Ernst v. Hudson River R. R. Co.*, 24 How. Pr. 108. "Ordinary care, skill, and diligence is such a degree of care, skill, and diligence as men of ordinary prudence, under similar circumstances, usually employ": *Brown v. Lynn*, 31 Pa. St. 512 [72 Am. Dec. 768].

The degree of care which men of common prudence would be likely to observe in a given case must be determined with reference to all the attendant circumstances. An injury by an engine in motion would necessarily be of a grave and serious character; but at a distance of eighty rods from the crossing, it would be as harmless to the wayfarer as the rail over which he drives. It is not unusual in argument to confound the seriousness of such an injury when it occurs with the probability of its occurrence, and to assume that the same degree of vigilance is demanded when the engine is not within the range of sound or vision as when it is seen in close proximity, or public warning is given of its approach.

The measure of precaution which ordinary prudence suggests is in due proportion to the probability of danger. When a train is seen, or known to be close at hand, a discreet man would stop until the danger is past; but to stand waiting in front of a public crossing, with no reason to believe that there is an engine within a quarter of a mile, would indicate over-cautious timidity, and would seem to most men puerile. On such subjects, as on all others, men exercise their reason, and do not yield to childish apprehensions of distant engines or unloaded guns. When they draw near a railway crossing, and the flagman gives no warning, when no sign or sound indicates the presence or approach of a train, they assume that they may safely cross, and proceed quietly on their way. If in such a case an engine, with muffled bell, rushes upon them too suddenly for escape, the wrong is due to those who falsely assured their safety by withholding the usual warning.

The citizen who on a public highway approaches a railway track, and can neither see nor hear any indication of a moving train, is not chargeable in law with negligence for assuming that there is no car sufficiently near to make the crossing dangerous: *Newson v. New York Central R. R. Co.*, 29 N. Y. 390; *Johnson v. Hudson R. R. Co.*, 20 Id. 74; *Hegan v. Eighth Avenue R. R. Co.*, 15 Id. 383; *Harpell v. Curtis*, 1 E. D. Smith, 78; *Gordon v. Grand St. R. R. Co.*, 40 Barb. 550; *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. St. 60, 72 [78 Am. Dec. 322]. In the case first cited, Judge Johnson, who delivered the opinion of the court, stated the rule thus: "The law will never hold it imprudent in any one to act upon the presumption that another, in his conduct, will act in accordance with the rights and duties of both." In the case of *Gordon v. Grand St. R. R. Co.*, *supra*, Judge Brown traced the rule to the reason on which

it was founded. "Negligence," he says, "cannot be predicated of such an act. Care in avoiding danger implies that there is, or would be with all prudent persons, something to create a sense of danger; for if the circumstances are not such as would put a prudent and cautious person upon his guard, the omission to exercise more than ordinary attention is not the negligence which contributes to an accident." In the case last cited, the court, in considering the effect of the omission to give the customary signals on the question of due care by the plaintiff, used language equally explicit. "A defendant cannot impute a want of vigilance to one injured by his act as negligence if that very want of vigilance were the consequence of an omission of duty on the part of the defendant."

In the present case, the defendants not only misled the testator by not exhibiting the flag at the crossing in accordance with the uniform custom when an engine was near, but also by approaching the highway illegally, neither sounding the whistle nor ringing the bell as they advanced. This was an act in open defiance of a public statute enacted for the protection of the traveler. It was a flagrant breach of duty to the passengers, whose safety it jeopardized; to the stockholders, whose property it imperiled; and to the testator, whose life it exposed. Its direct tendency was to put him off his guard, to disarm his vigilance, and to produce a false sense of security. To transfer the blame to him would be to screen the wrong-doer at the expense of the victim. It is not the policy of the law to favor those who deliberately violate its mandates, nor is it the duty of the courts to invent excuses for wrong-doers, or to palliate the guilt of reckless homicide. Our statutes for the protection of life are to be obeyed; and when they are broken and defied, responsibility is not to be evaded by imputing blame without proof to him who suffers death for the sake of shielding those who inflict it.

In this case, the parties inculpated have been sworn. Ernst, of course, could not confront them; but we are to judge him in the light of the evidence by the ordinary rules which govern human actions. He was a man of business, in the vigor of middle life, and in the full possession of his faculties; he was a man of family and of character, of experience and of judgment; he had no apparent motive or inducement to make a wanton sacrifice of his life; he had the ordinary instincts of humanity. If on this occasion he did anything which he ought not to have done, or left undone anything which he

ought to have done, it was in the brief interval of nineteen seconds.

It is said he should have looked north before he drove down the street, which the defendant, by violating the statute, could convert into a *cul-de-sac* to the traveler. That was precisely what he did; in turning his horses around to drive from Broadway into Rensselaer Street, he necessarily faced to the north and west, thus commanding a view of the track directly in front for a distance of some twenty rods. He did not see the cars, for the simple reason that they were not there; they were still behind the hill, and nearly sixty rods northeast of the crossing.

It is claimed that he started at a high rate of speed; but the proof is that he started on a walk; that he went down Rensselaer Street on a slow trot, and that he did not quicken his gait until as he approached the track he was beckoned to hasten onto the ferry-boat, which was waiting for him at the landing. It is also said that he should have been on the lookout for the flag, uniformly displayed at the crossing when a train was near. He did look, and he saw that there was no flag; which was a direct assurance by the defendant, that there was no engine advancing on either side within a quarter of a mile. He was forewarned of no approaching danger; and it was not to be expected under such circumstances that he should be forearmed with extraordinary vigilance.

The plaintiff is reproached with the fact that her husband had a shawl round his neck. It is the ordinary precaution on a cold winter morning of every traveler who has one to wear, and it was no more a breach of duty to this railroad company than it would have been if he had worn a fur cap or a second overcoat. It is claimed that he should have listened for the whistle and the bell. He did; and the fact that neither was sounded was a further assurance by the defendant that there was no engine in motion within eighty rods of the crossing. It is also claimed that he should have stood up in his sleigh. He owed no such duty to the defendant. It would be scarcely more absurd to hold that a footman should climb a tree or mount a fence, before crossing, to assure himself that the company was not breaking the law by sending an engine without signals to run over travelers on a public highway.

It is insisted that he ought to have looked before him, and on both sides as he advanced. He did; for he is proved to

have been a man of clear vision, and he could not avoid so looking, except by closing his eyes. He was sitting on the bottom of his sleigh, and of course his range of view was essentially limited; but to say that he did not or could not see whatever was within that range would be in direct hostility to the proof. It would be as idle as it would be to assume that one who is driving down the center of State Street cannot see that there are buildings on both sides of the way; or that a Hudson River pilot cannot see both shores of the river in front of him, without turning his head back and forth in the wheel-house.

It is said that he should have observed the man who was beckoning to him from the ferry side of the track. He doubtless did, unless the horses in front of him partially obstructed his view; and it is reasonable to assume that he understood it, as others did, as urging him to hurry onto the boat. It is claimed that he was bound by an inflexible rule of law to see, to hear, and to understand the two persons who hallooed—one from the station-house and the other from the store—as he was passing between them. There is no such rule of artificial presumption, and we see no reason for its adoption, if we were at liberty to change the law of evidence. It would be an arbitrary legal intendment, on a pure question of fact, without reason or truth to commend it. We have no authority to invent rules for the purpose of shielding wrong-doers. It was a question of fact for the jury, whether the testator saw and heard these men. His advanced position and his winter attire did not favor a lateral view. It is obvious that he did not hear what they said, for it was heard by no one else; and they were speaking simultaneously from opposite sides of the street. Neither of them called him by name; and if his attention was directed, as it naturally would be, to the movement of his horses, and the steep descent to the ferry-boat directly in front of them, he probably assumed that the men were speaking to each other across the street, an incident of ordinary occurrence in a country village. It is quite probable, too, that he heard simultaneously the rush of the train, as all this occurred within a few seconds of the fatal collision. His horses were under full headway; and every one who is accustomed to drive knows the difficulty of controlling even a single horse when brought suddenly in presence of an engine rushing upon him at the rate of forty miles an hour. It is proved and undisputed that his horses were frightened; that they sheered southwardly on

the track; and that he struggled ineffectually to rein them back. The evidence establishes an adequate cause of death in the defendant's wrong. It affords no warrant for imputing to the testator the guilt of complicity in that wrong.

The comments made by Judge Wright upon the proof in the grossly exaggerated form which it assumed on a previous trial have still more controlling force in their application to the evidence as now presented, when the most important portion of that then given by the defendant is abandoned. "It is doubtful from the evidence," said the learned judge, "whether at the time the signals and hallooing occurred the deceased had not approached so near the track that it was impossible to stop his horses short of it, even if he had heard and understood the warnings to be of the approach of the cars. This was a question for the jury; for to have given these warnings any significance, the fact should have clearly appeared that it was in his power by heeding them to avoid the collision. So, also, the signals and hallooing were understood differently by the by-standers; one thought they meant to keep off; another to come on the boat; while others did not understand their meaning at all. The whole transaction must have been embraced within a few seconds of time; and the hallooing and gesticulations of the by-standers, even if observed by the deceased, were well calculated to confuse him. Those who made the motions did not understand each other. The deceased was bound for the ferry-boat, then on the point of leaving, and was hailed to come on; the hallooing proceeded from different points. Hearing no bell or whistle, and observing no flagman, the decedent might well have concluded that no train was approaching, and that the hallooing was to hasten him toward the boat. It is fair to presume that he did not hear the words spoken, as the witnesses did not hear what was said by each other. At all events, I think it was a question for the jury whether Ernst did not understand the signals and outcries as invitations to hasten to the ferry-boat; and if he did so understand them, then I agree with the learned judge who delivered the opinion of the court in this case on the former hearing, that 'they were calculated to induce him to do just what he did do, and might naturally disarm a prudent person of the suspicion of danger approaching from another quarter.'"

In a subsequent portion of the same lucid and able opinion he adds: "He had a right to assume that in propelling their

cars the defendants would act with appropriate care; that trains would approach the crossing at proper speed; that the usual signal of approach would be seasonably given; that the managers of the train would be attentive and vigilant; that the flagman would be at his post and guard the crossing on the arrival of trains not intending to stop. Ordinary prudence scarcely dictated that he should so have conducted as to protect himself against the culpable acts and omissions of duty of the defendant's employees in propelling a train of cars past a known station, and across a crowded thoroughfare, at the speed of forty miles an hour, ringing no bell, sounding no whistle, disregarding the lookout, and having no flagman on duty to warn of impending danger. Seeing no flagman, and hearing none of the usual signals of the approach of a train, it was not unreasonable or imprudent to conclude that no train was approaching, and that consequently there would be no danger in passing over the track. Besides, the tendency of a neglect by the employees of the company to give proper notice of the approach of the train was to cause the deceased to be less attentive than he otherwise would have been. He was by the negligence of their employees in a degree thrown off his guard, and induced to attempt to cross the track, apprehending no danger. The presumption is irresistible that he would not have taken a step toward hazarding his life if he had been made aware by the usual signals of the proximity of the train. It is by no means clear that he did not see the train after getting west of the station-house, but too late in the excitement and confusion of the moment to have so controlled his horses as to have avoided the collision."

The *dernier* claim of the appellant, all other other defenses failing, is that the testator was guilty of culpable negligence in not listening for and hearing the rumble on the rails of a train which he had no reason to expect, and which gave no signal of its approach. That he did not hear it in time to escape the collision is so obvious that the defendants do not claim that he did; but they insist that he ought to have heard it, and that his failure to do so was a breach of duty to the company. This theory is founded on the incidental opinions expressed by two of the witnesses, not as to the distance this train might have been heard under the actual circumstances and with the intervening obstructions, but on the general question how far it might be possible to hear a train approaching when omitting the customary signals in violation of law.

Neither of them professed to speak from actual knowledge or observation, and their estimates were widely different. One thought it might be detected at a distance of one or two miles, and the other, that it would not be audible when the whistle would be at a distance of seven or eight rods.

It is obvious that speculative opinions on such a question scarcely rise to the grade of evidence. The distance at which the approach of a train can be heard without the signals must depend on a great variety of circumstances, such as the structure and condition of the particular rails, the firmness of the ties, the size of the train, the direct or winding course of the track, the condition of the atmosphere, the direction and force of the wind, the shutting off of steam, the proximity of the listener to the line of the rails, the prevalence of other sounds, the acuteness of the observer's hearing, the depression or elevation of the track, the vicinity of valleys, woods, and hills, the hour of the day or night, the comparative silence of the country, or the hum and bustle of city life, and the vicinity of steamboats, factories, and public works. Mere speculation on the general question, without reference to these and other like conditions, is plainly idle and illusory. It is proved as matter of fact that though such a number of witnesses were present on this occasion, each under more favorable circumstances for hearing it than the testator, the practiced ear of the ferry-man, who listened daily for the approach of the trains, did not catch the sound until the engine was within three hundred feet; Taylor, Traver, Ten Eyck, Hunter, and Van Denburgh did not hear it at all until just as it rushed down over the crossing; the horses of Ernst did not hear it until they were close upon the track; and at the ice-house Brown did not hear it until his wagon was upon the rails, and the engine within less than a hundred feet of him.

It was because the approach of a railway train is stealthy and imperceptible, and because the sound is not readily distinguishable from others associated with no danger, that to secure the traveler at once against needless apprehension and needless exposure a statutory mandate was given to every such company in this state to approach no public highway crossing with an engine without public and distinctive signals of danger for a distance of eighty rods before passing such crossing. The duty is plain and absolute; the company which violates it does so at its peril. If its agents are faithless, it should dismiss them; if its officers choose to disobey a law

for the protection of human life, or to tolerate its violation by their subordinate agents, the remedy is in the hands of the stockholders, by selecting those who will respect our public statutes. When the illegal act results in the death of a citizen, the company must respond, unless he has been guilty of a breach of duty which contributed to his destruction. He is not guilty of such breach of duty when he assumes, in the absence of any indication to the contrary, that the company obeys the law, and that no engine is advancing to the crossing within a distance of eighty rods without public signals of its approach. If he is deceived by the unlawful omission of the signals, the wrong is not his, but theirs.

The illegal act of the company does not, however, justify him in encountering the risk of crossing if he sees or hears the approach of the engine, or is otherwise notified of its presence, in season to avoid the peril. In that case, he is guilty of culpable negligence, and the company is relieved from the responsibility of causing his death. But it is no defense to the wrong-doer that though the victim did not see or hear the engine, and was not notified of its approach in time to avoid the collision, he might have seen or heard it if he had exercised a higher degree of vigilance, and had foreseen a violation of the law, instead of relying upon its observance. Such a theory has received countenance in a few instances in the opinions of individual judges. It has support in the *dictum* of the accomplished and able jurist who delivered the prevailing opinion in this cause on a former occasion. This question, however, was not then passed upon by the court, nor was it involved in the decision. On the proof as then presented, the question was, whether one was culpably negligent who rode nearly 150 feet in full view of an approaching train, who knew it to be due, and who persisted in driving against it, though notified by four persons of its presence in season to avoid the danger.

The usual argument in favor of the theory in question is, that trains are constantly passing and repassing at every railway crossing. Certainly, we are not admonished of this by the constant ringing of bells; and every man of ordinary observation knows the fact to be otherwise. If ten regular trains a day run over a given highway, they render the crossing unsafe when they pass, and only then. It is free from danger, except at most for twenty minutes in the aggregate of each twenty-four hours; and the traveler is safe against exposure

at those momentary intervals if the company obeys the law and rings the bell. If it will not do that, it has no cause of complaint against the wayfarer whom it voluntarily misleads. In such a case, the language of Chief Justice Beardsley is appropriate: "A man is under no obligation to be cautious and circumspect toward a wrong-doer": *Tonawanda R. R. Co. v. Munger*, 5 Denio, 266 [49 Am. Dec. 239].

It is not true that a traveler on a public thoroughfare is guilty of culpable negligence as matter of law if he does not stop to listen, or look up and down the track, before he goes over a crossing. The proposition is in direct conflict with repeated adjudications in this and in other courts. Whether such an omission is culpable depends upon the facts and circumstances of each particular case.

There is a class of cases in which the proof of the plaintiff's negligence is clear and undisputed; and whenever this appears, a nonsuit is matter of legal right. A party who sees or hears an approaching engine, and chooses to take the risk of crossing before it rather than await its passage, forfeits all claim to redress; and under such circumstances, it is not only the right, but the duty, of the courts to apply the familiar rule,—*Volenti non fit injuria*. But there is another class of cases in which it is equally well settled that we have no authority to impute negligence to the deceased for an omission which may fairly be attributed to the very wrong resulting in his death.

In the case of *Brown v. New York Central R. R. Co.*, 32 N. Y. 597, we held that no culpable negligence was established, though it was proved by the driver of the coach demolished by the collision that he did not look in the direction from which the cars were approaching until his horses were on the track, the usual signal of danger not being given as they advanced to the crossing; and this though it appeared in evidence that if he had looked before he would have seen them in season to avoid the collision. The doctrine of that case was unanimously reaffirmed, upon a like state of facts, at the last December term of this court: *Stillwell v. New York Central R. R. Co.*, 34 Id. 29.

In the earlier case of *McGrath v. Hudson River R. R. Co.*, 32 Barb. 147, the same rule was clearly announced. "It is not always negligence," said the court, "to cross a railroad track at times when a train is not due or cannot reasonably be expected to pass; nor to cross a railroad track without looking

for a train, when no signal of its approach is given by the ringing of a bell or otherwise." So also in the case of *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227 [85 Am. Dec. 700], it was held by the supreme court of Massachusetts, a state in which no undue rigor of intendment is supposed to prevail on this subject, that crossing a railroad track without looking to see if a train is coming is not conclusive proof of want of care.

In the case of *Fero v. Buffalo and State Line R. R. Co.*, 22 N. Y. 213 [78 Am. Dec. 178], it was claimed that the plaintiff could not recover for the injury, as it was apparent that he could readily have averted it by the exercise of greater care; but this court held that "if he was guilty of no culpable negligence, the mere fact that he might have been more vigilant will not excuse the wrongful act of the defendants, nor deprive the plaintiff of redress for the injury he has suffered."

The question whether the plaintiff was free from negligence in ordinary cases of this description is one of fact to be determined by the jury under appropriate instructions, and subject to the revisory power of the courts. Occasional instances occur where the proof of misconduct is so clear and decisive that the judges are bound to pass on the question of negligence as matter of law. It is a mistake, however, to suppose that the decisions made from time to time in these two classes of cases conflict with each other, or involve any departure from the settled rules of law. Where the question arises on a state of facts on which fair-minded men may rationally arrive at opposite conclusions, the issue is properly submitted to the jury. Where, as sometimes happens in exceptional cases, the injury is traceable to clear and unquestionable misconduct on the part of the plaintiff, it is the plain duty of the court to apply the law to the facts, without the intervention of the jury. In the present case, there is a renewal of the attempt so often made to extend the exceptional rule to all classes of cases. It is our province to uphold the law, and not to alter it; we believe it to be wise and just; but if we deemed it otherwise, we have no authority to subvert it. We should be restrained from making the innovation proposed, not only by our own repeated adjudications, but by that time-honored and elementary maxim on which our system of jurisprudence is founded,—*Ad questionem facti non respondent iudices, ad questionem legis non respondent juratores.*

The views of this court as to the right of the party claiming redress to have the question whether he was free from negli-

gence determined ordinarily by the jury have been repeatedly expressed with great clearness and emphasis. In the case of *Ireland v. Oswego R. R. Co.*, 13 N. Y. 533, Judge Johnson said: "The fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the consideration of the jury and pronounced upon as matter of law. On the contrary, it is almost always to be deduced as an inference of fact from several facts and circumstances disclosed by the testimony after their connection and relation to the matter in issue have been traced, and their force and weight considered. In such cases, the inference cannot be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement which is consistent throughout. Presumptions of fact, from their very nature, are not strictly objects of legal science like presumptions of law. That the care exercised by the plaintiff at the time of the injury, and the negligence of the defendant, were both questions for the jury to determine, cannot admit of any doubt."

In the case of *Keller v. New York Central R. R. Co.*, 28 How. Pr. 177, Judge Mason delivered the opinion of the court, and after citing the foregoing exposition of the rule, he proceeded to say: "What constitutes negligence in such cases is determined by an inference of the mind from the facts and circumstances of the case; and as minds are differently constituted, the inference from a given state of facts and circumstances will not always be the same. I admit that the facts may be so clear and decided that this inference of negligence is irresistible, and in every such case it is the duty of the judge to decide; but when the facts or the inference to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury under proper instruction."

Similar views were expressed by Judge Denio in the case of *Hegan v. Eighth Avenue R. R. Co.*, 15 N. Y. 383, and by Judge Selden in that of *Bernhardt v. Rensselaer and Saratoga R. R. Co.*, 23 How. Pr. 168. It was said by the latter, with the precision and perspicuity which mark all his judicial opinions, that "although as a general rule questions of negligence belong exclusively to the jury, cases may no doubt arise in which the proof of negligence would be so clear and irresistible that the court would be justified in assuming, without submitting the question to the jury, that negligence was established. At

the same time, it is obvious, considering the nature of the question, that such instances must be rare. If there is any conflict in the evidence going to establish any of the circumstances upon which the question depends, it must be left to the jury. If there are inferences to be drawn from the proof which are not certain and incontrovertible, they are for the jury. If it is necessary to determine, as in most cases it is, what a man of ordinary care and prudence would be likely to do under the circumstances proved, this, involving as it generally must more or less of conjecture, can only be settled by a jury."

The struggle of defendants to inaugurate a different rule, and to induce the courts to resort to artificial refinements for the protection of wrong-doers, is perhaps excusable in those who are impatient of legislative restraint. There is an unfortunate and growing tendency to regard human life as of secondary importance in comparison with the objects of commercial and corporate enterprise. The aid of the courts is invoked to annul by indirection the force of general laws. Suits and appeals multiply in the constantly increasing ratio of reckless injuries, which nothing could tend more to encourage than this theory of immunity from civil damages, on the assumption, as matter of law, that a party over whom an engine is driven is culpable for not keeping out of the way, and that the question whether he was really guilty of negligence is not one of fact for a jury.

If it be true, as is sometimes intimated even from the bench, that false verdicts are occasionally rendered on questions like this, the remedy is to set them aside, and not to usurp the prerogative of the jury. Even among the cases which have been held so plain as to justify a nonsuit, there have been few in which the judges have not themselves disagreed; and the inquiry naturally occurs to the mind, whether we are less liable than jurors to err on questions of pure fact pertaining to the ordinary affairs of life. Our law is framed upon the theory that on such questions the citizen can rely with more security on the concurrent judgment of twelve jurors than on the majority vote of a divided bench. Unanimity is not required in our decisions on questions of law; it is otherwise with jurors charged with the duty of determining issues of fact; and such issues should not be withheld from the usual arbiters unless the evidence leads so clearly to one result that there is no room for honest difference between intelligent and upright

men. A nonsuit should always be granted where the proof is so clear as to warrant the assumption in good faith that if the question were submitted to the jury they would find that the culpable negligence of the plaintiff contributed to the injury. But we have had occasion recently to hear nonsuits of this kind justified on the novel ground that unless the fact be determined in one way by the judge, it will be sure to be determined the other by the jury. The correctness of judicial opinions on mere questions of fact may well be distrusted when we find them confessedly opposed to the common sense of mankind. The judgment should be reversed, and a new trial ordered.

HUNT, J., delivered a concurring opinion.

DUTY OF TRAVELER ON HIGHWAY TO USE HIS SENSES OF SIGHT, HEARING, ETC., TO AVOID DANGER AT RAILWAY CROSSINGS. — The rights and duties of travelers and railroad companies using highways are said to be mutual, reciprocal, and equal; both have a right of passage, neither has an exclusive right, and neither has a superior right, so that each must use ordinary care to avoid injury: *Chicago etc. R. R. Co. v. Still*, 19 Ill. 499. In New York, it has been held that the railroad company has the preference or right of way: *Warner v. New York etc. R. R. Co.*, 44 N. Y. 465; but conceding that this is so, it does not impose on the traveler the whole duty of avoiding a collision; each must use the diligence of prudent persons under the circumstances: *Continental Imp. Co. v. Stead*, 95 U. S. 161. A full discussion of the duties of railroad companies in this regard will be found in the extended note to *Baltimore and Ohio R. R. Co. v. Breinig*, ante, p. 54.

The general rule as to the duty of persons attempting to cross a railroad track is, that they must make reasonable use of their senses of sight and hearing. The track itself is a proclamation of danger: *Stubley v. London etc. R'y Co.*, L. R. 1 Ex. 13; *Gillespie v. Newburgh*, 54 N. Y. 471; and the traveler in attempting to cross should assume that there is danger, and act with ordinary prudence and circumspection under that assumption: *Daniel v. Metropolitan R'y Co.*, 5 H. L. Cas. 45; *State v. Maine C. R. R. Co.*, 76 Me. 357; S. C., 49 Am. Rep. 622. He must listen for signals, notice signs put up as warnings, and look attentively up and down the track, and a failure to do so without reasonable excuse is a failure to use ordinary and reasonable care. This statement of the general rule is supported by a multitude of authorities: See Deering on Negligence, sec. 252; Whittaker's Smith on Negligence, p. 401; Beach on Contributory Negligence, p. 401; and the following among other cases: *Schofield v. Chicago etc. R. R. Co.*, 2 McCr. 268; S. C. on appeal, 114 U. S. 615; *South & N. A. R. R. Co. v. Thompson*, 62 Ala. 424; *Gothard v. Alabama etc. R. R. Co.*, 67 Id. 115; *Chicago etc. R. R. Co. v. Bell*, 70 Ill. 102; *Illinois Cent. R. R. Co. v. Goddard*, 72 Id. 567; *Rockford R. R. Co. v. Byam*, 80 Id. 528; *Chicago etc. R. R. Co. v. Dinick*, 96 Id. 42; *Pennsylvania etc. R. R. Co. v. Rudel*, 100 Id. 603; *Peoria R. R. Co. v. Claybery*, 107 Id. 644; *St. Louis etc. R. R. Co. v. Mathias*, 58 Ind. 65; *Terre Haute R. R. Co. v. Clark*, 73 Id. 168; *Pittsburgh etc. R. R. Co. v. Martin*, 82 Id. 476; *Saverenz v. Chicago etc. R. R. Co.*, 56 Iowa, 689; *Funston v. Chicago etc. R. R. Co.*, 61 Id. 452;

Butterfield v. Western R. R. Corp., 10 Allen, 440; *Wheelock v. Boston etc. R. R. Co.*, 105 Mass. 207; *Tully v. Fitchburg R. R. Co.*, 134 Id. 499; *Brown v. Milwaukee etc. R'y Co.*, 22 Minn. 165; *Abbott v. Chicago M. etc. R'y Co.*, 30 Id. 482; *New Orleans etc. R'y Co. v. Mitchell*, 52 Miss. 808; *Fletcher v. Atlanta etc. R. R. Co.*, 64 Mo. 484; *Hentz v. St. Louis etc. R'y Co.*, 71 Id. 636; *Powell v. Missouri & P. R. R. Co.*, 76 Id. 80; *Havens v. Erie R'y Co.*, 41 N. Y. 296; *Cordell v. New York O. R. R. Co.*, 75 Id. 330; *Stackus v. New York Cent. R. R. Co.*, 79 Id. 464; *Wendell v. New York R. R. Co.*, 91 Id. 420; *Pennsylvania R. R. Co. v. Rathgeb*, 32 Ohio St. 66; *Baltimore & O. R. R. Co. v. Whitacre*, 35 Id. 627; *North Pennsylvania R. R. Co. v. Heilman*, 49 Pa. St. 60; *North Penn. R. R. Co. v. Beale*, 73 Id. 504; S. C., 13 Am. Rep. 753; *Baughman v. Chenango etc. R. R. Co.*, 92 Id. 335; S. C., 37 Am. Rep. 690; *Boham v. Milwaukee etc. R. R. Co.*, 58 Wis. 30.

A plaintiff need not affirmatively prove that he stopped, looked, and listened; the presumption is that he did so, and the burden of proving contributory negligence is on the plaintiff: *Weiss v. Pa. R. R. Co.*, 79 Pa. St. 387.

Perfect composure in danger, entire self-possession, and accurate decision upon the wisest course to be adopted is not required, but a traveler is required only to exercise the ordinary prudence of sensible men in similar cases: *Cook v. New York R. R. Co.*, 1 Abb. App. 436; S. C., 3 Keyes, 479; and in proportion to the danger impending: *Toledo W. Co. v. Shuckman*, 50 Ind. 42. But that care must be exercised, and mental absorption from business, grief, etc., will not excuse its omission: *Baxter v. Troy etc. R. R. Co.*, 41 N. Y. 502. The fact that one allowed his attention to be diverted is no excuse: *Brooks v. Buffalo etc. R. R. Co.*, 25 Barb. 600. The presumption is that a man of mature years is in possession of his senses, and will exercise ordinary diligence to avoid danger, and the engineer of a train may act in accordance with such presumption; and it is not negligence on his part when he sees ahead of him a man upon or near the track that he does not stop the train, and go forward and push the man off or from the track, but instead, assumes that the man possesses ordinary capacity, can see and hear, and reason from cause to effect, and that he will, as the train approaches him, step aside and avoid the danger of being run over: *Indianapolis etc. R. R. Co. v. McClaren*, 62 Ind. 568; *Lake Shore etc. R. R. Co. v. Miller*, 25 Mich. 279; *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. St. 804; *Houston etc. R. R. Co. v. Smith*, 52 Tex. 278.

Attempting to cross a track without using due care to ascertain if a train is coming is certainly contributory negligence: *Morris v. Haslan*, 33 N. J. L. 147; *Langhoff v. Milwaukee etc. R. R. Co.*, 23 Wis. 43; *Hearne v. Southern Pac. R. R. Co.*, 50 Cal. 482; and it has been said that a failure to look and listen is not merely evidence of negligence, but is negligence *per se*: *Nashville etc. R. R. Co. v. Heileman*, 49 Pa. St. 464; *Scham v. Pennsylvania R. R. Co.*, 107 Id. 12; and that such conduct is very little short of recklessness: *Dascomb v. Buffalo etc. R. R. Co.*, 27 Barb. 221.

Failure on the part of the railroad company to do its duty in giving customary or statutory signals and warnings will not in itself excuse any one from using the senses of sight and hearing upon approaching a railroad crossing, and whenever the due use of either sense would have enabled the injured person to escape danger, his failure to use it is conclusive proof of negligence, without any reference to the company's failure to perform its duty: *Railroad Company v. Houston*, 95 U. S. 397; *Schofield v. Chicago etc. R. R. Co.*, 2 McCr. 268; S. C. on appeal, 114 U. S. 618; *Field v. Chicago etc. R. R. Co.*, 4 McCr. 575; *Chicago & A. R. R. Co. v. Robinson*, 8 Ill. App. 140; *Chicago etc. R. R.*

Co. v. Notzki, 66 Ill. 455; *Bellefontaine R. R. Co. v. Hunter*, 33 Ind. 335; *St. Louis R. R. Co. v. Mathias*, 50 Id. 65; *Hinckley v. Cape Cod R. R. Co.*, 120 Mass. 257; *Maryland C. R. R. Co. v. Neuber*, 60 Md. 391; *Moore v. Central R. R. Co.*, 24 N. J. L. 268; *Pennsylvania R. R. Co. v. Bichter*, 42 Id. 180; *Ernst v. Hudson River R. R. Co.*, 39 N. Y. 358; *Hawens v. Erie R. R. Co.*, 41 Id. 502; *North Penn. R. R. Co. v. Heileman*, 49 Pa. St. 60; *Ormsbee v. Boston etc. R. R. Co.*, 14 R. I. 102; *Zeigler v. R. R. Co.*, 5 S. C. 221; *Bowers v. Chicago etc. R. R. Co.*, 61 Wis. 457; and this though the train was running at a high and dangerous rate of speed: *Schofield v. Chicago etc. R. R. Co.*, 114 U. S. 618; *Holland v. Chicago etc. R. R. Co.*, 18 Fed. Rep. 243; *Cincinnati etc. R. R. Co. v. Butler*, 2 N. E. Rep. 138 (Ind.).

While the negligence of a traveler in approaching a crossing without any attempt to discover the approach of a train would, as already stated, be gross and reckless, notwithstanding failure of the company to give signals, there are many cases in which the conduct of the railroad company in omitting to give proper signals or warnings will excuse a less degree of negligence on the part of the traveler: *Klanowski v. Grand Trunk R'y Co.*, 24 N. W. Rep. 802. In this case the court say: "In approaching a crossing upon a highway, the circumstances differ in almost every case. Sometimes they are favorable to making an early discovery of the train, and many times not; sometimes the team requires more attention than at others; in some cases the approach to the track is up, and at others down; some persons have quicker sight than others, and can see at far greater distances; at some crossings the train moves on an up grade, and at others on a down grade; the road-bed being often elevated, and not unfrequently depressed below the surface of the highway; and in most cases the view is more or less obstructed by fences, bushes, shrubbery or embankments. Many times the train runs much stiller than at others, in consequence of the conditions of the atmosphere and other causes; in all cases, persons, except those in charge of the train, are liable to be deceived in the speed of the train, and in no case is the exact time when the engine reaches the crossing known to others than the engineer. All persons have a right to expect and rely upon the full performance by the company of all the requirements and duties imposed upon it by the law, and it is not unfrequently impossible to ascertain with any degree of certainty how far the neglect of the company to give the required warning at highway crossings may have been relied upon by a person in regulating and determining his action in approaching the track, where a collision and injury occurs, resulting in his immediate death. Usually the circumstances surrounding the accident have to be relied upon in determining the question, and such action on the part of the injured party should never in this class of cases be allowed to control the verdict of jurors, unless it satisfactorily appears to have been very gross or wantonly negligent or careless." See *Wilcox v. Rome*, 39 N. Y. 362, citing the principal case. Where, however, it clearly appears that a proper use of the senses under the circumstances would have avoided the injury, proof of an omission to use them will justify the taking of the case from the jury and granting of a nonsuit: *Gorton v. Erie R'y Co.*, 45 Id. 664.

There are a large number of cases in which the rules above stated have been adopted, all under more or less varying circumstances. The following will illustrate instances and peculiar circumstances under which the rules have been applied: It is held not be contributory negligence on the part of a traveler to fail to use his senses when their use would not have discovered the approach of the train: *Leonard v. New York etc. R. R. Co.*, 42 N. Y.

Super. 225; *Davis v. New York etc. R. R. Co.*, 47 N. Y. 400; *Hackleford v. New York etc. R. R. Co.*, 6 Lans. 381; S. C., 53 N. Y. 654.

It is not as a matter of law the duty of the traveler to stop as well as to look and listen before crossing: *Garland v. Chicago & N. W. R'y Co.*, 8 Ill. App. 571; *Kellogg v. N. Y. Central R. R. Co.*, 79 N. Y. 72; *Eilert v. G. B. etc. R. R. Co.*, 48 Wis. 606. Whether he should stop depends upon the attendant circumstances: *Pittsburgh etc. R. R. Co. v. Wright*, 80 Ind. 236; *Shaber v. St. Paul etc. R'y Co.*, 28 Minn. 103; and where he assures himself shortly before by looking each way that there is no car approaching which would make the crossing hazardous, his attention, with due regard to his own safety, may be properly turned for an instant to see if there is any obstruction before him on the track, or excavation in his way, or danger of collision with other passengers passing to or from the cars: *Chaffee v. Boston etc. R. R. Corp.*, 104 Mass. 116. It is held that a person who is driving is not required to get out of his wagon and go forward on foot for the purpose of looking: *Pittsburgh R. R. Co. v. Wright*, 80 Ind. 182; *Davis v. New York etc. R. R. Co.*, 47 N. Y. 400; and especially where the collision would not thereby have been prevented: *Pennsylvania R. R. Co. v. Ackerman*, 74 Pa. St. 265; *McGuire v. Hudson R. R. Co.*, 2 Daly, 761; *Webber v. New York etc. R. R. Co.*, 58 N. Y. 451; *Cleveland R. R. Co. v. Crawford*, 24 Ohio St. 361; or would have contributed to rather than prevented it: *Duffy v. Chicago etc. R. R. Co.*, 32 Wis. 269. Failure to look up and down at the exact moment of stepping on the track is not generally held in itself to be negligence, or evidence of a want of care: *Chaffee v. Boston etc. R. R. Co.*, 104 Mass. 116; *Plummer v. Eastern R. R. Co.*, 37 Me. 591; *Zimmerman v. Hannibal R. R. Co.*, 71 Mo. 476; *Texas etc. R. R. Co. v. Chapman*, 57 Tex. 75; *Houston etc. R. R. Co. v. Wilson*, 60 Id. 142.

But in Pennsylvania and Minnesota it has been held that the traveler should stop, go forward, and look when stepping upon the track, and even get out of his wagon and lead his horse: *Shaber v. St. Paul etc. R'y Co.*, 28 Minn. 103; *Pennsylvania R. R. Co. v. Beale*, 73 Pa. St. 504; *Pennsylvania R. R. Co. v. Ackerman*, 74 Id. 265. It is held that it is not as a matter of law negligent for one approaching a crossing in a buggy not to let down the top of the buggy in order to look about: *Stackus v. New York etc. R. R. Co.*, 79 N. Y. 464; but where one approached a crossing in a covered wagon, having an umbrella hoisted inside as an additional protection from rain falling at the time, and did not take it down to look about, but looked only straight ahead, it was held that he was negligent in so doing, and could not recover for a resulting injury: *Sheffield v. Rochester etc. R. R. Co.*, 21 Barb. 339.

Generally, if one is sick, lame, imbecile, etc., he cannot call upon others to supply his deficiencies and compensate him for resulting losses: *Sheridan v. Boston C. & R. R. Co.*, 34 How. Pr. 222; S. C., 36 N. Y. 43, citing the principal case. Still the law does not require that one's ears or eyes should be infallible: *Kuse v. New York etc. R. R. Co.*, 67 Barb. 205. If he is deaf, a duty is imposed on him to make greater use of his eyesight: *Central R. R. Co. v. Feller*, 84 Pa. St. 226; and vice versa: *Gonzales v. N. Y. & H. R. R. Co.*, 6 Rob. (N. Y.) 102, citing the principal case. To drive with ears muffled, especially where partially deaf, precludes recovery if signals appealing to the sense of hearing were given: *Cleveland etc. R. R. Co. v. Terry*, 8 Ohio St. 470. Neither will intoxication excuse one crossing a railroad track from the exercise of such care as is due from a sober man: *Kean v. Baltimore etc. R. R. Co.*, 61 Md. 174; *Houston etc. R. R. Co. v. Symphkins*, 54 Tex. 615; *Herring v. Wilmington R. R. Co.*, 51 Am. Dec. 395.

The fact that the traveler had no previous knowledge of the crossing and failed to learn of it in time to avoid the collision has been held no excuse: *Allyn v. Boston etc. R. R. Co.*, 105 Mass. 77; and certainly the fact that one acquainted with the vicinity forgot the location of the crossing is no excuse: *Baltimore & O. R. R. Co. v. Whitacre*, 35 Ohio St. 627.

Where there was noise sufficiently loud to drown the rumbling sound of a train in motion, the fact that the injured party did not listen, when there was no signal by either bell or whistle of the approaching train, was held not negligence: *Davis v. N. Y. etc. R. R. Co.*, 47 N. Y. 400; *Leonard v. N. Y. etc. R. R. Co.*, 10 Jones & S. 225. A railway crossing should at all times and under all circumstances be approached with caution; but at an obstructed crossing it is the duty of a traveler to exercise a greater degree of care and caution than is incumbent upon him usually: *Thomas v. Delaware etc. R. R. Co.*, 19 Blatchf. 533; *Strong v. Sacramento etc. R. R. Co.*, 61 Cal. 326; *Bunting v. Central R. R. Co.*, 14 Nev. 351; *Johnson v. Chicago etc. R. R. Co.*, 77 Mo. 546. Where the view of the track is obstructed, the traveler should use all his faculties to avoid danger: *Thomas v. Delaware etc. R. R. Co.*, 19 Blatchf. 538. But the railroad company in such a case must also use an extra degree of care. When a traveler upon approaching a railroad crossing at a point where the view is obstructed stops and listens for the customary signals, and hearing nothing drives upon the track and is immediately run over by a passing train and injured, the railway company will not be allowed to make the defense that the plaintiff was negligent in relying upon the fact that there was no whistle blown or bell rung at the crossing as evidence that no train was near. The plaintiff in such a case, having been lulled into a feeling of security by the defendant's negligent failure to make the required signal, and having suffered an injury thereby, may have his action: *Pennsylvania etc. R. R. Co. v. Ogier*, 35 Pa. St. 60. The supreme court of Iowa declares the law upon this point in the following language: "If the view of the railroad, as the crossing is approached upon the highway, is obstructed by any means so as to render it impossible or difficult to learn of the approach of a train, or there are complicating circumstances calculated to deceive or throw a person off his guard, then whether it was negligence on the part of the plaintiff or the person injured under the particular circumstances of the case is a question of fact for the jury": *Artz v. Chicago etc. R. R. Co.*, 34 Iowa, 160.

Where the traveler approaches the crossing and cannot see the track on either side, owing to piles of lumber, and he is struck by a train coming along ringing no bell, he is not guilty of contributory negligence sufficient to justify a nonsuit: *Strong v. S. & P. R. R. Co.*, 61 Cal. 326. Where his view is obstructed by buildings near the track, and he does not see the train until he passes the buildings, when his team becomes unmanageable, he is not as a matter of law negligent in not stopping before reaching the buildings: *Faber v. St. Paul etc. R'y Co.*, 29 Minn. 465. Where one is driving a four-horse team along a road running parallel with and near to a railroad, and is approaching a crossing, and the air is so filled with dust that he cannot see, and his wagon makes some noise, and he attempts to cross the track without stopping to listen for an approaching train, he is contributorily negligent: *Fleming v. West Pac. R. R. Co.*, 49 Cal. 253. Where a train was running in a city at less than the speed prescribed by ordinance, and the bell was being rung, one who drives his team on a crossing where his view is obstructed cannot recover: *Gothard v. Ala. G. S. R. R. Co.*, 67 Ala. 114, overruling *Nashville & D. R. R. Co. v. Comans*, 45 Id. 437. Where a person who

heard the whistle of an approaching train attempted to drive across the track without knowing from what direction the train was coming, his view in one direction being obstructed, he was held guilty of gross negligence barring a recovery: *Griffin v. Chicago etc. R'y Co.*, 27 N. W. R. 792 (Iowa).

Where a company has by its own act obstructed the view of the track, a plaintiff in approaching the crossing in a team is not negligent in not stopping: *Mackey v. N. Y. etc. R. R. Co.*, 35 N. Y. 75; *Bunting v. O. P. R. R. Co.*, 14 Nev. 351. In such a case he has a right to presume that the usual statutory signals will be given: *Bunting v. O. P. R. R. Co.*, *supra*. And if the obstructions are such that he can neither see nor hear distinctly, the giving of the statutory signals is no excuse for failing to warn the traveler: *Richardson v. N. Y. etc. R. R. Co.*, 45 N. Y. 846. It is negligence for a company to permit its cars to stand upon and obstruct a public street; and where by reason of such obstructions the view of the track in one direction is cut off, and it is rendered impossible to observe a train approaching in that direction, it is not negligence as a matter of law for a plaintiff to omit to look in that direction: *McGuire v. Hudson R. R. Co.*, 2 Daly, 76. Where it appeared that a company allowed the view to be obstructed by a house and brush on its right of way, that the train, being behind time, was going at an unusual speed, and that the statutory signals of approach were not seasonably given, the company is liable, although the traveler was negligent in listening or looking: *Chicago etc. R. R. Co. v. Lee*, 87 Ill. 454; S. O., 68 Ill. 576.

It has been held that where one about to cross a track had his attention distracted by watching out against one train, and was injured by another train coming in the opposite direction, which, owing to the presence of the other, he had failed to observe, he is not guilty of contributory negligence precluding recovery: *Leonard v. New York etc. R. R. Co.*, 42 N. Y. Super. 225; *Oasey v. N. Y. C. R. R. Co.*, 78 N. Y. 518; *New Jersey R. R. etc. Co. v. West*, 32 N. J. L. 91; *Pennsylvania R. R. Co. v. Fortney*, 90 Pa. St. 323. Whether it is negligent for one about to cross a track not to wait until a train which has just passed has got far enough away to afford an unobstructed view of the track in that direction is held to be a question for the jury in *Philadelphia R. R. Co. v. Carr*, 99 Id. 505. A railroad consisting of several lines crossed a public footpath on a level at a point near a station, but the footpath was not in other respects dangerous. On each side of the railway was a good and sufficient swing gate. The railroad company, by way of extra precaution, usually, but not invariably, fastened the gates when a train was approaching. B, wishing to cross the railway, found the gate unfastened, and a coal train standing immediately in front of it. He waited until the coal train had moved off, and then, without looking up or down the line, commenced crossing the railway, and was killed by a passing train. If he had looked up the line, he would have seen the train coming in time to stop and avoid the accident. In an action against the company by B's administratrix, it was held in the English common pleas that B contributed to the accident by his negligence. It was argued that the mere failure to perform a self-imposed duty is not actionable negligence, that the omission to fasten the gate did not amount to an invitation to B to come onto the track, and that therefore, even if B were not guilty of contributory negligence, the company was not liable: *Skelton v. London etc. R'y Co.*, L. R. 2 Com. P. 631. Where one stepped off one track because a train was approaching behind, and without looking around, walked along near to a side-track, and was struck by a yard engine, he being well acquainted with the locality, he is

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guilty of contributory negligence: *Austin v. Chicago, R. I. etc. R. R. Co.*, 9th Ill. 35. Where a traveler is misled by appearances, seeing a train with the rear toward him, and believing it to be receding when in fact it is approaching, it is a question for the jury whether under the circumstances in continuing to cross he exercises proper care: *Bonnell v. Delaware etc. R. R. Co.*, 39 N. J. L. 189. Where the plaintiff's intestate was struck by a locomotive at a crossing immediately after another with a bright head-light has passed, evidence as to how long the eye required after looking at a brilliant light to recover the natural power of sight was admissible: *Shafer v. St. Paul etc. R'y Co.*, 28 Minn. 103.

If traveler attempts to cross a railroad track at a station for the purpose of taking the cars, without looking to see if a train is approaching, but goes upon the invitation and under the direction of the station agent, it is a question for the jury whether in so crossing he uses due care: *Wheelock v. Boston etc. R. R. Co.*, 105 Mass. 207; *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227; S. C., 85 Am. Dec. 701.

The fact that one supposed a regular train had passed, when in fact it had not and was behind time, his omission to use care is not excusable: *Toledo etc. R. R. Co. v. Jones*, 76 Ill. 311; *Mahlen v. Lake Shore etc. R. R. Co.*, 49 Mich. 585; and so where he was misled by his watch being out of order, and not indicating the proper time: *Murray v. Pontchartrain R. R. Co.*, 31 La. Ann. 490.

Trying to cross a track in full view of an approaching train has been held to be negligence per se: *Maryland etc. R. R. Co. v. Newber*, 62 Md. 391; *Gross v. Maine C. R. R. Co.*, 69 Me. 412; and if a traveler undertakes to get over the track by fast driving when in full view of the train, he cannot recover: *Gross v. Maine C. R. R. Co.*, *supra*. But if, having approached the crossing without negligence so near as to render retreat apparently impossible, the traveler resorts to fast driving as the only practicable means of extricating himself from the danger of his situation, such a course may be justifiable on the ground of prudence, *Macon etc. R. R. Co. v. Davis*, 27 Ga. 113, even though, had he not been overcome with terror at the sudden peril in which he found himself, he might have acted more wisely. But see *Wright v. Great Northern R. R. Co.*, 8 Ir. L. R. 257, C. P. Div.

THE PRINCIPAL CASES ARE CITED in the following cases, and to the points stated: Negligence is a question of fact, and not of law, as a general rule: *Detroit & M. R. R. Co. v. Van Steinburg*, 17 Mich. 118. The issue of negligence is for the jury when the evidence is conflicting, or where fair room for a difference of opinion among different men exists: *Barrett v. Third Avenue R. R. Co.*, 8 Abb. Pr., N. S., 210; S. C., 1 Sweeny, 573; *Burke v. Broadway & S. A. R. R. Co.*, 49 Barb. 531; S. C., 34 How. Pr. 249; *Bateman v. Ruth*, 3 Daly, 385; *Pendril v. Second Avenue R. R. Co.*, 41 How. Pr. 411; S. C., 34 N. Y. Super. 486; *Wolfkeil v. Sixth Avenue R. R. Co.*, 38 N. Y. 651; *Seabrook v. Hecker*, 4 Rob. (N. Y.) 348; *Delafeld v. Union F. Co.*, 5 Id. 210; *Gonzales v. New York & H. R. R'y Co.*, 6 Id. 297. To determine what in most cases a man of ordinary prudence would do under certain circumstances is peculiarly the province of the jury: *Lamb v. Camden & A. R. R. Co.*, 2 Daly, 467. The case must certainly be a clear one which would authorize the court to take the case from the jury: *Wooden v. Austin*, 51 Barb. 11. But a nonsuit is proper when it is clear that if submitted to a jury the verdict would certainly be for the defendant: *Thring v. Central Park R. R. Co.*, 7 Rob. (N. Y.) 617. Upon a motion for a nonsuit, the court is bound to give the most favorable construction for plaintiff: *Imhoff v. Chicago & M. R. R. Co.*, 22 Wis. 684.

All persons must as a rule exercise the same care which men of ordinary prudence and common intelligence would do under like circumstances: *Devlin v. Pike*, 5 Daly, 105; *Kellogg v. Chicago & N. W. R. R. Co.*, 23 Wis. 255. More care is required toward a child than toward an adult: *O'Mara v. Hudson R. R. Co.*, 38 N. Y. 449. One person is justified in presuming that the other will act in accordance with the rights and duties of both, and this is not negligence or imprudence: *Johnson v. Belden*, 2 LAM. 437; *Davenport v. Ruckman*, 37 N. Y. 573; *Milton v. Hudson River Steamboat Co.*, 37 Id. 212. Failure of a railroad company or its servants to provide or make proper signals bears on the question of negligence: *Lake Shore & M. S. R. R. Co. v. Miller*, 25 Mich. 295. Thus omission to have a flagman at proper places is negligence: *Belstegel v. New York Central R. R. Co.*, 40 N. Y. 31. The principal case came up on rehearing, and was approved in every particular: See 39 Id. 66.

BOEHEN v. WILLIAMSBURG CITY INSURANCE CO.

[35 NEW YORK, 151.]

GENERAL AGENT OF INSURANCE COMPANY MAY WAIVE CONDITION in policy that until actual payment of the premium the insurance shall not be considered as binding; and delivery of the policy without exacting prepayment of the premium is evidence of an intention to give credit.

ACTION by the heirs of Boehen upon a fire-insurance policy. The policy was issued in 1856, and one year later a certificate of renewal was issued. The policy provided that no insurance should be binding until actual payment of the premium. It appeared upon the trial that the certificate of renewal was delivered by the agent of the company to the insured without exacting prepayment of the premium. Nothing was said about credit. The fire occurred twenty days after issuance of the certificate of renewal. On the day after the fire, plaintiffs tendered the premium, which the company refused to accept. Motion for a nonsuit was denied. Judgment went for plaintiffs, and defendant appealed.

Reynolds, for the appellants.

Briggs, for the respondents.

By Court, MORGAN, J. The case is not made up in such a form as to present any question for review except the question arising out of the refusal of the referee to order a nonsuit; and this question requires the court to examine the evidence relied upon to show a waiver of one of the conditions of the policy of insurance, which provides in express terms that "no insurance, whether original or continued, shall be considered as binding until the actual payment of the premium." This

clause in policies of insurance has been before the court in several cases, and has received a judicial construction which leaves no room to question the authority of a general agent to make a valid insurance without exacting prepayment of the premium.

It was so held in *Goit v. National Policy Ins. Co.*, 25 Barb. 189. In that case, however, the proofs showed that the agent agreed to give credit until he made his returns to the company; and after the fire occurred, he accepted payment of the premium. The same point was decided in this court in *Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 805, and in *Sheldon v. Atlantic Ins. Co.*, 26 Id. 460 [84 Am. Dec. 213], where the general agent sent a certificate of renewal by mail to the plaintiff, with a statement that the premium charged was higher than usual, and saying: "Should you decline the policy, please return it by mail; if you retain it, please send me the premium." The court decided that this was evidence which would authorize a jury to find that there was a waiver by the defendants of the prepayment of the premium.

But in *Wood v. Poughkeepsie Mutual Ins. Co.*, 32 N. Y. 619, the plaintiff was nonsuited, and the judgment of nonsuit sustained in this court, upon the ground that there was no evidence to authorize the jury to find such a waiver. The case states that the agent had delivered over the certificate of renewal to the plaintiff's clerk in the plaintiff's absence on condition that when he came home he should pay the premium if he accepted, and return the policy if he declined it. The plaintiff neither paid the premium nor returned the policy. Judge Porter, who delivered the prevailing opinion, says that the agent, on leaving the policy with the plaintiff, made it an express condition that the premium should be paid or the policy returned; but that the plaintiff undertook to appropriate the policy in disregard of the condition, and without the consent of the company. This opinion was concurred in by a majority of the judges. Judge Davis wrote a dissenting opinion, in which he referred to certain portions of the evidence as indicating an assent on the part of the agent to the plaintiff's retaining the policy without prepayment of the premium. He was of opinion that the prior dealings between the plaintiff and agent of the company in respect to other policies, where credit had been given for the premiums, should have been admitted in evidence, from which the jury might

have inferred a waiver of prepayment of the premium. He thought it was difficult to perceive any substantial distinction between the case in hand and that of *Sheldon v. Atlantic Fire Ins. Co.*, 26 N. Y. 460 [84 Am. Dec. 213]; two of the judges concurred with him.

It is not necessary to say, nor do I perceive, that the two cases above referred to are in conflict. The principle decided is the same in both cases; the disagreement among the judges having arisen more from the different impressions which the same state of facts left upon their minds than from any difference of opinion as to the law of the case. In the case at bar, so far as the evidence discloses the circumstances, the certificate of renewal was delivered by the agent of the company without qualification or condition; and there is some evidence which tends to prove that its existence as a valid insurance was recognized by the president during the subsequent negotiation for an increase of insurance upon the same property. The evidence, taken together, leaves but little doubt that the certificate was delivered to the plaintiff's agent without exacting prepayment of the premium, with an understanding that it was to be paid on demand, or when the question of an additional insurance was settled by the company.

As a general rule, agents of insurance companies should not deliver over policies without payment of the premiums if they do not intend to give a credit. The mere fact of such delivery without condition raises a presumption that a short credit is intended. The delivery of the policy in *Wood v. Poughkeepsie Ins. Co.*, *supra*, was held to be conditional, from the language of the agent and the circumstances attending the transaction; otherwise the company would have been held liable for the plaintiff's loss. Judge Porter observed in that case that the law would have implied a waiver if the policy had been delivered by the agent without requiring payment of the premium, and it had been accepted by the plaintiff as a complete and executed contract.

In the case at bar, there is no ground upon which to predicate a conditional delivery of the certificate of renewal except what arises out of the terms of the original policy, and we have seen that an actual and unconditional delivery of the policy without requiring prepayment will be construed into a waiver, notwithstanding the terms of the written policy. I am satisfied that in a great majority of cases such is the understanding of both parties when a policy is delivered over to

the insured without exacting payment of the premiums, and that the rule as stated by Judge Porter in *Wood v. Poughkeepsie Ins. Co.*, *supra*, is correct, and should be applied to this case. The judgment should be affirmed.

Judgment affirmed.

GENERAL AGENT OF INSURANCE COMPANY MAY WAIVE CONDITION IN POLICY that no insurance shall be considered binding until actual payment of the premium: *Sheldon v. Atlantic F. & M. Ins. Co.*, 84 Am. Dec. 213, and note. The principal case is followed on this point in *Behler v. German M. T. Ins. Co.*, 68 Ind. 351; *O'Reilly v. Guardian M. L. Ins. Co.*, 1 Hun, 464; S. C., 2 Thomp. & C. 491; *Dean v. Aina L. Ins. Co.*, 2 Hun, 359; S. C., 4 Thomp. & C. 504; *Van Allen v. Farmers' J. S. Ins. Co.*, 4 Hun, 413; S. C., 6 Thomp. & C. 593; *Shear v. Phania M. L. Ins. Co.*, 4 Hun, 801; *Hotchkiss v. Germania F. Ins. Co.*, 5 Id. 98; *Washoe Tool Mfg. Co. v. Hibernia F. Ins. Co.*, 7 Id. 77; *McLean v. Republic F. Ins. Co.*, 3 Lana. 425; *Whitwell v. Putnam F. Ins. Co.*, 6 Id. 169; *Peckner v. Putnam F. Ins. Co.*, 6 Id. 416; *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 122; *McNeilly v. Continental L. Ins. Co.*, 66 Id. 29; *Church v. Lafayette F. Ins. Co.*, 66 Id. 225; *Van Schoick v. Niagara F. Ins. Co.*, 68 Id. 439; *Walek v. Hartford F. Ins. Co.*, 73 Id. 11.

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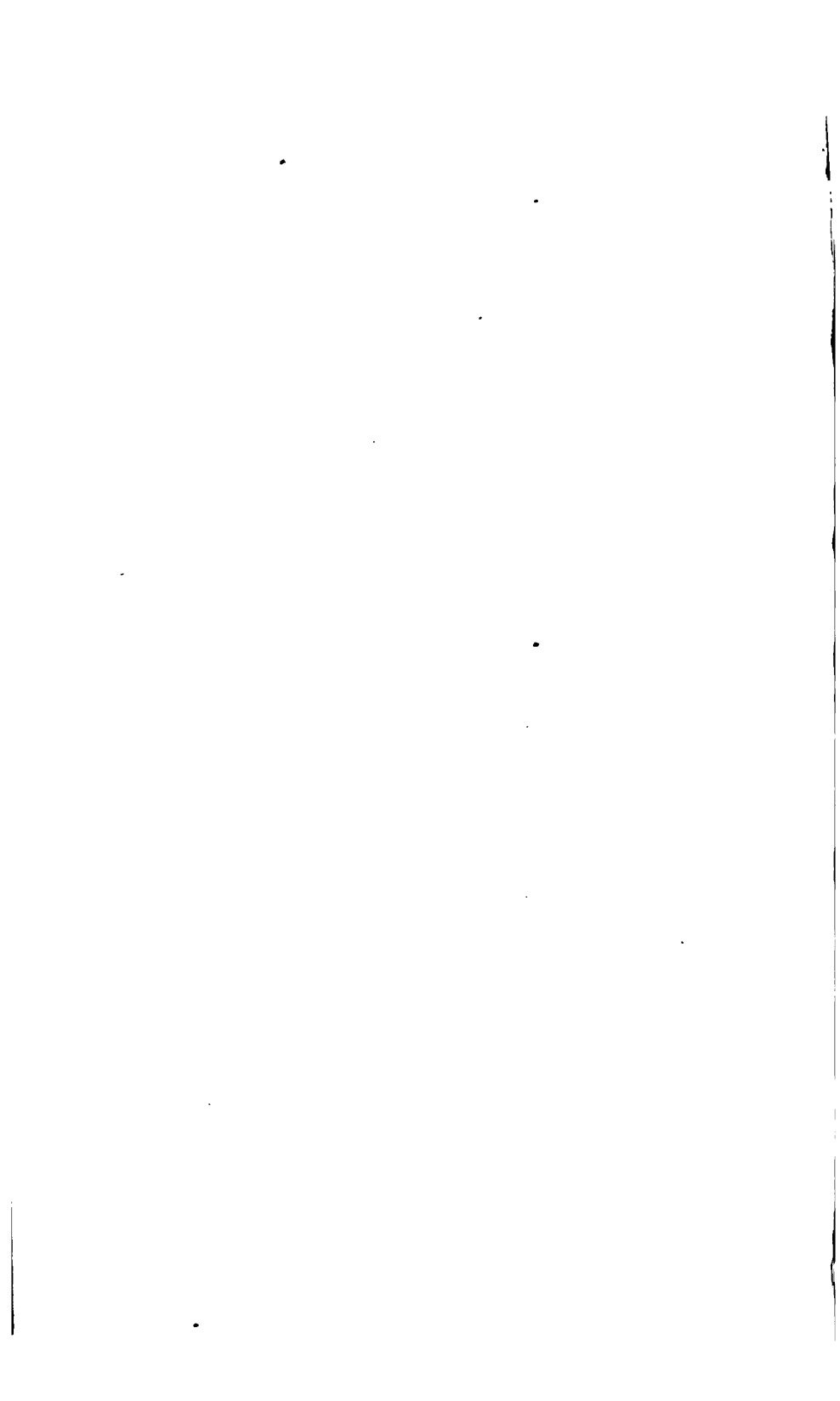
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1. THERE IS NO NEED OF PRESUMING DEED WHERE ADVERSE POSSESSION for time required by statute is shown, as the adverse possession of itself alone would be evidence of an estate in fee, and equivalent to an absolute title. *Warfield v. Lindell*, 443.
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See POSSESSION.

AGENCY.

1. ACT OF PART OWNER ACTING AS AGENT FOR ALL OWNERS CONCLUDES all the part owners. *Chouteau v. Goddin*, 402.
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3. AGENT EMPLOYED TO MAKE SALES, AND SELLING ON CREDIT, IS NOT AUTHORIZED SUBSEQUENTLY TO COLLECT PRICE IN NAME of his principal; and payment to him will not discharge the purchaser unless he can show some authority in the agent, other than that necessarily implied in a mere power to make sales. Such authority may be shown by proof that he had such power expressly, or that his principal held him out as possessing it. *Law v. Stokes*, 655.

4. **PRINCIPAL IS LIABLE FOR ACTS OF HIS AGENT** within the power he has actually given him, and also in regard to things over which he knowingly permits him to assume authority. And an agent who has power to do a particular act has also power to do whatever usually belongs to the doing of it, or is necessary to its performance. *Id.*
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See BANKS AND BANKING; BROKERS; INSURANCE.

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See NEGOTIABLE INSTRUMENTS, 1, 2.

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See COMMON CARRIERS, 13, 14.

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See HUSBAND AND WIFE, 1-3.

ASSIGNMENTS.

1. **ACTION FOR BREACH OF CONTRACT MUST AT COMMON LAW BE BROUGHT IN NAME OF CONTRACTING PARTY**, and not in the name of his assignee, for the assignment of a non-negotiable demand does not at common law entitle the assignee to pursue remedies in his own name upon the contract; though the court will take notice of the assignment for the purpose of protecting the interest of the assignee. *Sison v. Cleveland etc. R. R. Co.*, 252.
2. **MICHIGAN STATUTE ALLOWING ASSIGNEE TO SUE IN HIS OWN NAME UPON CONTRACT** is only permissive in its provisions, and the assignee is still at liberty to sue in the name of the contracting party. *Id.*

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See **BANKS AND BANKING**, 1.

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ASSUMPSIT.

See **EQUITY**, 3.

ATTACHMENT.

1. **ACTION FOR MALICIOUSLY SUING OUT ATTACHMENT CANNOT BE SUSTAINED UNLESS IT IS PROVED** by satisfactory evidence that the plaintiff in the attachment knew that he had no cause of action whatever against the defendant, and that he also acted maliciously therein. *Alexander v. Harrison*, 431.
2. **IN ACTION ON ATTACHMENT BOND, PLAINTIFF CAN ONLY RECOVER NATURAL AND PROXIMATE DAMAGES** resulting from the attachment; but he may also sue in a special action on the case for a malicious abuse of the attachment process, and recover damages beyond the natural and proximate actual damages resulting from the attachment. *Id.*
3. **CLIENT CANNOT BE HELD LIABLE IN ACTION FOR MALICIOUSLY SUING OUT ATTACHMENT** where he has fairly submitted all the facts of the case to his counsel in good faith, and is advised by them that he has a cause of action against the defendant in the attachment, and merely pursues the course recommended by them, relying upon the correctness of their legal opinion. Malice cannot be imputed to him in such a case, and it is error to instruct the jury in such manner that they may so find. Neither is there a want of probable cause. *Id.*
4. **MALICE IN SUING OUT ATTACHMENT PROCESS CONSISTS IN IMPROPER MOTIVE**, not necessarily any positive malignity or corruption, but a willful disregard of the rights of others, "whether it be to compass some unlawful end, or some lawful end by unlawful means, or to do a wrong and unlawful act, knowing it to be such." Thus it would be malice enough that an attachment is sued out by a person who knows that he has no cause of action, for this would merely be to vex, harass, and injure the party sued. *Id.*
5. **ATTORNEY IS COMPETENT WITNESS, IN ACTION FOR MALICIOUS ATTACHMENT**, where he consulted with counsel upon the case in which the attachment issued, and may testify as to what opinion was given to the plaintiff in the attachment suit by such counsel. *Id.*
6. **DELIVERY OF POSSESSION OF PERSONALTY IS SUFFICIENT** as against subsequent attaching creditors of the vendor where the latter executes a deed of certain realty, followed by a bill of sale of the personalty thereon, and delivers possession of everything about the premises to the vendee, and surrenders the keys to the agent of the latter. In such case, a removal

of the personal property from the premises is not necessary. *Sharon v. Shaw*, 546.

7. **REGISTRY OF DEED AS NOTICE OF SALE OF PERSONALTY.** — Where the vendor executes a deed of realty, followed by a bill of sale of the personal property thereon, and delivers possession of whole to the vendee, the recordation of the deed by the latter is notice to subsequent attaching creditors of the vendor of the sale and transfer of the real and personal property. *Id.*
8. **DELIVERY OF POSSESSION OF PERSONALTY NOT SUFFICIENT** as against subsequent attaching creditors. Where a vendor executes a deed of real estate, and also a bill of sale of the personal property thereon, but includes in such bill of sale other personalty not on the land conveyed, the latter-named personal property, without further change of possession, does not vest in the vendee as against subsequent attaching creditors of the vendor. *Id.*
9. **MERE NOTIFICATION OF SERVANT IN CHARGE** that personal property has been sold, accompanied with a request by the purchaser to continue in his employment, is not such delivery or change of possession as will vest the property in him as against subsequent attaching creditors of the party from whom he bought. *Id.*
10. **ATTACHING CREDITOR ONLY ACQUIRES SUCH RIGHTS AGAINST GARNISHEE AS DEBTOR POSSESSED**, and no process or proceedings can place the garnishee in a different or worse position than he would have occupied if sued directly by the debtor in the attachment suit. *Weil v. Tyler*, 441.
11. **GARNISHEE IS NOT LIABLE IN ATTACHMENT UNLESS DEBT IS DUE IN MONEY.** It is only a debt due in money that can be garnished. A debt or note for specific articles cannot be garnished. *Id.*

See ASSIGNMENT, 3; SET-OFF.

ATTORNEY AND CLIENT.

1. **RULE THAT ATTORNEY OR COUNSELOR CANNOT**, without the consent of his client, be compelled to disclose any fact communicated by the client to him, or advice given in the course of professional employment, has been adopted in Nevada, but it will not be so enforced as to allow the client to take advantage of it to the prejudice of the attorney, or so as to deprive the latter from obtaining or defending his rights. *Mitchell v. Bromberger*, 550.
2. **WHEN DISCLOSURE OF PRIVILEGED COMMUNICATIONS** becomes necessary to the protection of the attorney's rights, in a suit between him and his client, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his protection. *Id.*

See ATTACHMENT, 5; MORTGAGES, 8.

AUCTIONS.

PRINTED CONDITIONS UPON WHICH SALE BY AUCTION PROCEEDS CANNOT BE VARIED or contradicted by parol evidence of the verbal statements of the auctioneer made at the time of the sale, except for the purpose of showing fraud. But parol evidence that is not repugnant to the printed terms of sale, but consistent with and explanatory of them, is admissible. Where, therefore, the wrecks of vessels lying in a river are sold by name as lying at certain localities, evidence is admissible to show that the ma-

terials were lying in the river at the localities named, and that the names were wrongly given, the wrecks being incapable of identification by their names, and being masses of rubbish rather than specific chattels. *Chow-teau v. Goddin*, 462.

See EXECUTORS AND ADMINISTRATORS, 1; TAXATION.

BAILMENTS.

See COMMON CARRIERS, 10.

BANKS AND BANKING.

1. **EQUITABLE ASSIGNMENT.** — Check drawn upon a bank for more than the amount of the drawer's funds on deposit creates no lien upon and gives the payee no right to the actual balance until the bank has agreed to pay it *pro tanto*. *Dana v. Third National Bank of Boston*, 216.
2. **NOTARY PUBLIC IS MADE AGENT OF BANK, AND ONE OF ITS OFFICERS,** where the bank appoints him by the year to do all of its notarial business, and requires of him a bond for the faithful discharge of his duties. *Gerhardt v. Boatman's Saving Institution*, 407.
3. **BANK RECEIVING PROMISSORY NOTES FROM ITS DEPOSITORS FOR COLLECTION IS RESPONSIBLE FOR NEGLIGENCE OF NOTARY,** who has been constituted its agent, in failing to give notice to an indorser of a negotiable promissory note of a demand upon and refusal of payment by the maker, and by which the maker was discharged. The notary, in such a case, does not act in the character of an independent officer in the performance of a duty imposed upon him by law. *Id.*

See NEGOTIABLE INSTRUMENTS, 16-18.

BONA FIDE PURCHASERS.

JUDGMENT CREDITORS DO NOT OCCUPY VANTAGE-GROUND OF BONA FIDE PURCHASERS for a valuable consideration without notice in the marshaling of securities. *Herbert v. Mechanics' Building and Loan Association*, 601.

BONDS.

See GUARDIAN AND WARD; INTEREST, 4; MISTAKE, 2; SURETYSHIP, 1, 2.

BOUNDARIES.

1. **ACTS AND DECLARATIONS OF SURVEYOR WHILE SURVEYING ADJOINING LOT** are admissible on a question of boundary, where the surveyor is dead, and was not interested as owner in either lot at the time he made such declarations. *Adams v. Blodgett*, 569.
2. **PRACTICAL LOCATION IS BUT ACTUAL DESIGNATION BY PARTIES** upon the ground of the monuments and bounds called for by the deed. *Wells v. Jackson Iron Mfg. Co.*, 575.
3. **SURVEY OF LAND AND ERECTION OF MONUMENTS WITH VIEW OF SUBSEQUENT CONVEYANCE** cannot be admitted in evidence to vary or control the deed afterwards made, where the deed calls for none of the monuments, and does not refer to the survey. *Id.*

See SURVEYS.

BROKERS.

REAL ESTATE BROKER CANNOT RECOVER IN ACTION AGAINST VENDOR FOR COMMISSIONS where he reports an offer for property to his principal,

without stating who makes it, and the same property is afterwards sold through another broker, to whom a commission is paid, for the same price, and to the same purchaser, unless it appears in evidence that the seller knew who the purchaser was, and of the sale to him, or that notice of these facts was given him by the plaintiff before the completion of the contract with and payment of commissions to the second broker. *Tinges v. Moale*, 73.

COLLATERAL SECURITY.

See PLEDGE; SET-OFF.

COMMON CARRIERS.

1. OBLIGATION OF RAILROAD COMPANY FOR SAFE TRANSPORTATION OF PASSENGER IS ONE ARISING FROM CONTRACT, imposing duties growing out of the relation between the parties, involving trust and confidence, and requiring the exercise of the utmost diligence and care. *Baltimore etc. R. R. Co. v. Breinig*, 49.
2. CARRIERS OF PASSENGERS ARE NOT INSURERS, but are bound to the utmost care and skill in the performance of their duty. And the carrier will be liable for an injury mediately or immediately caused by its negligence, the party injured not having directly contributed by his negligence to the injury. *Hueloenkamp v. Citizens' Railway Co.*, 399.
3. CARRIERS OF PASSENGERS ARE NOT INSURERS OF THEIR SAFETY, and are not responsible where all reasonable care, skill and diligence, prudence and foresight, have been employed. They are not liable for mere accident in the absence of any want of that degree of care and prudence which the law requires. *Sawyer v. Hannibal etc. R. R. Co.*, 382.
4. COMMON CARRIERS OF PASSENGERS WITH THEIR ORDINARY BAGGAGE, FOR HIRE, ARE LIABLE for losses occurring from any accident to the baggage while it is in their keeping as carriers, except those arising from the act of God or a public enemy. *Roth v. Buffalo & S. L. R. R. Co.*, 736.
5. LIABILITY OF COMMON CARRIER OF PASSENGERS FOR THEIR BAGGAGE IN-TRUSTED TO HIS CARE TERMINATES within a reasonable time after the arrival of the baggage at the point of destination, where the carrier is ready to deliver the same to the passenger according to the terms of the contract. *Id.*
6. COMMON CARRIERS ARE NOT BOUND TO PUT PASSENGERS OFF at their place of destination as they are bound to deliver goods, but must allow them sufficient time and opportunity to leave the vehicle. *Southern R. R. Co. v. Kendrick*, 332.
7. THEY MUST DISTINCTLY ANNOUNCE STATIONS, AND GIVE REASONABLE WARNING AND TIME for passengers to alight; but are not required to warn each passenger personally. *Id.*
8. PASSENGERS MUST TAKE NOTICE OF ESTABLISHED CUSTOM OF RAILROADS, and use reasonable care to leave the vehicle and to avoid accidents.
9. WANT OF ORDINARY CARE BY PASSENGER WILL PRECLUDE RECOVERY. If a passenger is asleep when the station is properly announced, he cannot recover for being carried past his destination. *Id.*
10. CARRIER LIABLE ONLY AS BAILEE, WHEN. — Where passenger refuses or neglects to remove his baggage within a reasonable time after reaching the place of his destination, and the carrier thereafter retains it unclaimed by the owner, his liability is changed from that of an insurer to the responsibility of an ordinary bailee, liable only for losses occasioned by his own fault. *Roth v. Buffalo & S. L. R. R. Co.*, 736.

11. WHERE UNDISPUTED FACTS SHOW CONDUCT OF PASSENGER, in neglecting to call for his baggage after reaching place of destination, to be unreasonable, it should be so held as a matter of law. *Id.*
12. RAILROAD COMPANY IS NOT LIABLE FOR PASSENGER'S TRUNK, where he did not call for it after reaching the place of destination, but left it in the hands of the company over night, for his own convenience, and without any arrangement with them, and where it was destroyed by the burning of the depot before morning by an accidental fire, which did not occur from any negligence or fault on the part of the company. The subsequent liability of the company became simply that of an ordinary bailee. *Id.*
13. RAILROAD COMPANY UNDERTAKING TO CARRY LIVE ANIMALS FOR HIRE is bound to provide cars of sufficient strength to prevent the animals from breaking through the same; and will be responsible for a loss occurring through failure to do so, although the animals were unruly and vicious, but not for an injury to the animals occurring simply from their own viciousness or unruliness, while being carried in a proper car. *Smith v. New Haven etc. R. R. Co.*, 166.
14. MEASURE OF DAMAGES IN ACTION AGAINST COMMON CARRIER for failure to transport live animals to market and deliver them there in good condition on a certain day, in accordance with his undertaking, where such failure is attributable to a cause other than act of God or the public enemy, is the difference between their market value there in good condition on the day when they ought to have been delivered, and their market value there in their actual condition on the day when they were delivered. *Id.*
15. LOSS OF GOODS BY ACT OF PUBLIC ENEMY WILL EXCUSE COMMON CARRIER to whom they have been intrusted for transportation for failure to deliver them, provided the loss be not occasioned by his own negligence or want of proper care. *Clark v. Pacific R. R.*, 458.
16. WHERE SEVERAL RAILROAD COMPANIES ARE SUED FOR DELAY ON JOINT CONTRACT of transportation, evidence introduced by them as to which of them should have furnished cars at a particular point of the transportation is immaterial, since they were jointly liable for a failure to fulfill the contract, and the plaintiff had no concern with any arrangement of the defendants among themselves. *Sisson v. Cleveland etc. R. R. Co.*, 252.
17. CARRIER WHO AGREES TO TRANSPORT FROM TOLEDO TO BUFFALO goods which he knows to be destined for an Albany or New York market is liable for a loss caused by a fall in prices in the Albany market, where a delay occurred in the transportation between Toledo and Buffalo, and the loss occurred before the goods could be delivered at Albany, notwithstanding there was no fall in prices when the goods reached Buffalo; for the loss must be regarded as the direct consequence of the defendants' delay. *Id.*
18. LOSS BY DEPRECIATION OF MARKET IS PROXIMATE RESULT OF DELAY IN TRANSPORTATION, and may be recovered as damages against a carrier. *Id.*
19. CARRIER IS NOT RELIEVED FROM LIABILITY FOR LOSS BY FALL OF MARKET, in case of delay of transportation of cattle, by provisions of the contract of transportation that the shipper assumes "all and every risk of injuries which the animals or either of them may receive in consequence of any of them being wild, unruly, vicious, weak, escaping, maiming,

or killing themselves or each other, or from delays," etc., "and risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to or from or in the loading or unloading the stock"; for this stipulation refers to injuries to the cattle caused by delay, etc., and to loss or damage by reason of delay in loading or unloading, and has no reference to other losses which the delays of the carrier may cause to the shipper. *Id.*

20. DECLARATIONS OF CONDUCTOR AS TO CAPACITY OF ENGINE TO DRAW TRAIN are admissible as part of the *res gestæ* in an action against a carrier for delay, where they related to the delay complained of, and were made while the conductor was engaged in the business of the defendants, in respect to the contract in question, and had control of the train. The defendants would not be absolutely bound by such statements, but they are admissible evidence on the general principles of agency. *Id.*

See RAILROADS; SHIPPING.

CONDITIONAL SALES.

See MORTGAGES, 3-6.

CONFLICT OF LAWS.

See CONTRACTS, 4; DOMICILE; JUDGMENTS, 8-10.

CONSPIRACY.

See CRIMINAL LAW, 2-4.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW. — OBLIGATION OF CONTRACT HAS REFERENCE TO ITS PERFORMANCE rather than to the consequences of a breach. The rights of the parties with respect to the nature, construction, and effect of the contract are beyond the legislative power to change. *Coffman v. Bank of Kentucky*, 311.
2. REMEDY PERTAINS TO FORUM, OR TO MODES OF PROCEEDING at the time and place of enforcement, and with certain restrictions and limitations, is subject to the legislative power. *Id.*
3. WHEN REMEDY IS ESSENTIAL PART OF CONTRACT it cannot be changed. To take away all legal remedies, or so to change and obstruct them as materially to impair the value and benefit of the contract, is within the prohibition of the constitution. *Id.*
4. "STAY LAWS" WHICH PREVENT ALL PROCEEDINGS IN COURTS for the collection of debts, with few exceptions, for a long period, are unconstitutional. *Id.*
5. POWER OF LEGISLATURE TO SUSPEND LAWS conferred by the declaration of rights does not include a power to transcend or suspend the constitution, or to suspend any rights guaranteed thereby. *Id.*
6. ACTS CLEARLY UNCONSTITUTIONAL MUST BE DECLARED SO BY JUDICIARY without reference to their expediency; and the pecuniary interests of the people, or sympathy for their misfortunes, cannot be considered. *Id.*
7. CONSTITUTIONALITY OF MARYLAND ACT OF 1864, CHAPTER 348, RELATING TO ISSUING OF LICENSES TO SELL SPIRITUOUS LIQUORS. — This act gave to the qualified voters of the borough of North East, in Cecil County, the privilege of deciding by ballot whether any license to sell spirituous and fermented liquors, etc., should be granted, etc., to sell the same

within the limits of the borough; and in case they should decide adversely to the issuing of the license, made it unlawful for the clerk of the circuit court to issue the same. This act, on *mandamus*, was held constitutional because the borough of North East, being an incorporated borough or municipality, with the usual power to pass by-laws and ordinances for its police regulations, it was competent for the legislature to confer upon it the power to prohibit the sale of ardent spirits within its limits, notwithstanding the general license law of the state. In such a case the local law would prevail. *Hammond v. Haines*, 77.

8. SAME. — ACT IN QUESTION WAS HELD NOT TO BE THAT KIND OF LAW which contains an express provision for referring it to a vote of the people for their acceptance before it can become a law. This law as it passed the legislature was complete in itself, and required no other sanction. *Id.*
9. CONSTITUTIONAL LAW. — POLICE POWER MAY BE DELEGATED TO MUNICIPAL CORPORATIONS under the general power of the legislature to establish such corporations. *City of St. Paul v. Colter*, 278.
10. MUNICIPAL LICENSE TAX UPON BUTCHERS' SHOPS MAY BE AUTHORIZED by the legislature. The business of vending butchers' meats is a legitimate subject of police and sanitary regulations. *Id.*
11. AMOUNT OF BUSINESS LICENSE FEE IS DISCRETIONARY with the legislature, and may be left by law to the discretion of the city authorities. Such discretion is not subject to judicial review when not grossly abused. *Id.*
12. EVIDENCE THAT AMOUNT IS NOT REASONABLY NECESSARY to regulate the business is not admissible; nor can it be shown that the fee was imposed solely for purposes of revenue. *Id.*
13. MUNICIPAL REGULATIONS IN RESTRAINT OF TRADE may be authorized by law; and in case of oppressiveness, the remedy lies with the law-making power. *Id.*
14. CONSTITUTIONAL REQUIREMENT THAT SUBJECT AND TITLE OF STATUTE SHALL BE SINGLE is not violated by an act to amend a city charter because providing that a county tax collector shall pay city taxes collected by him into the city treasury. *Id.*
15. LEGISLATURE HAS RIGHT TO CHANGE REMEDY AND PRESCRIBE RULES OF EVIDENCE, if its enactment does not create a new obligation or attach a new disability retrospectively; but it cannot annul any legal ground on which a previous action is founded, or create a new bar by which such action may be defeated. *Hope Mutual Ins. Co. v. Flynn*, 436.
16. STATUTE AMENDATORY OF CHARTER OF INSURANCE COMPANY, making the company's certificate of indebtedness conclusive evidence in all suits of the facts therein stated, is retrospective as to all causes of action originating prior to its passage, and is to that extent unconstitutional. *Id.*
17. CONSTITUTION OF MISSOURI PROHIBITS PASSAGE OF ANY EX POST FACTO LAW, or law impairing the obligation of contracts, or retrospective in its operation. *Id.*, 438.

See CORPORATIONS, 1-7; DOWER, 3, 4; EMINENT DOMAIN; EXEMPTIONS; STATUTES.

CONTEMPT.

1. CONTEMPT. — Power of judicature implies the right to exercise that function undisturbed by improper influences affecting it extraneously; and an

act done without the presence of the court, by a person neither a party to a suit nor an officer of the court, may amount to a contempt. *State v. Doty*, 671.

2. SUMMARY PUNISHMENT FOR CONTEMPT IS NOT PROHIBITED BY CONSTITUTIONAL PROVISION that "the right of trial by jury shall remain inviolate." *Id.*
3. IT IS CONTEMPT OF COURT FOR STRANGER TO MAKE ARRANGEMENT WITH JUROR TO SIGNAL the views of the jury to him after the jury have retired to deliberate. *Id.*

CONTRACTS.

1. CONTRACT IN RESTRAINT OF TRADE. — A contract made between citizens for this state, upon good consideration, by which one of them agrees not to set up, exercise, or carry on the trade or business of manufacturing shoe-cutters within the commonwealth of Massachusetts, is void, although it appears that such manufacture is an art which can be carried on only by persons instructed in the same; that at the time they made the agreement plaintiff and defendant were about to enter into a partnership for the manufacture of shoe-cutters; that the agreement was to take effect at the expiration of the partnership; that at the time the agreement was made defendant knew nothing of the business, and only plaintiff and three other persons in the state did. *Taylor v. Blanchard*, 203.
2. PARTY ELECTING TO RESCIND CONTRACT MUST RESTORE WHAT HE HAS RECEIVED under it, or pay its value, as a prerequisite condition. *Woodbury v. Woodbury*, 555.
3. CONTRACT TO PAY IN SPECIFIC ARTICLES OF PERSONAL PROPERTY BECOMES MONEY DEBT only after a demand and refusal to pay over the specified property, and no money judgment can be rendered on such contract until that time. *Weil v. Tyler*, 441.
4. VALIDITY, CONSTRUCTION, EFFECT, AND DISCHARGE OF CONTRACT ARE GOVERNED by the law in existence at the time it was made. The remedy to enforce the obligation of a contract may be modified without impairing the obligation of the contract. *Stephenson v. Osborne*, 358.

See CONSTITUTIONAL LAW; CORPORATIONS, 1-7; MARRIED WOMEN, 1, 2; MISTAKE, 1.

CORONER.

See EXECUTIONS.

CORPORATIONS.

1. CORPORATE CHARTER GRANTED BY LEGISLATURE is a contract between the state and the corporators, and the former cannot take away or impair any of the franchises or privileges granted. In other respects the corporation is subject to all general laws and police regulations made by the legislature after such grant, in the same manner as natural persons. *Zabriskie v. Hackensack etc. R. R. Co.*, 617.
2. LEGISLATURE MAY CONFER NEW PRIVILEGES upon corporation, to be accepted at its election. *Id.*
3. WHERE PARTIES ASSOCIATE THEMSELVES AS PARTNERS, or as a corporation, for a business and time specified in their agreement or charter, the objects and business of the partnership or corporation cannot be changed, abandoned, or sold out within the time specified without the consent of all the partners or corporators; one partner or corporator can prevent

it, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter. *Id.*

4. **RESERVATION OF POWER IN STATUTE CREATING CORPORATION**, that its charter may be altered, suspended, or repealed in the discretion of the legislature, is a reservation to the state for the benefit of the public, to be exercised by the state only, and does not extend to giving a power to one part of the corporators as against the others which they did not have before; nor can the legislature in the exercise of the power reserved authorize a bare majority of the corporators to change the object of the corporation in any manner. *Id.*
5. **RESERVED POWER OF LEGISLATURE TO REPEAL OR SUSPEND**, alter or modify, a charter is confined to an alteration of something contained in the franchises granted; the legislature has no power to make any substantial additions to the work. It cannot impose a new charter and oblige the stockholders to accept it, nor can it substitute a thing entirely different from that granted. *Id.*
6. **SUPPLEMENTAL FRANCHISE GRANTED CORPORATION**, authorizing it to construct additional work from that authorized by the original charter, but not compelling it to do so, is not an alteration or change of the original charter; it remains the same, and no new burdens are imposed except so far as the corporation assumes them. But the corporation is restrained from expending the money or using the credit of the shareholders in the additional enterprise unless every one of them consents. *Id.*
7. **STOCKHOLDERS CANNOT COMPLAIN OF CORPORATION** where they all consent by acquiescence in the construction and maintenance of a new enterprise authorized by a supplemental charter, but not within the grant of the original charter. *Id.*
8. **CORPORATION MAY BE GUILTY OF MALICIOUS PROSECUTION, AND ACTION THEREFOR WILL LIE AGAINST IT.** *Vance v. Erie R. R. Co.*, 665.
9. **CORPORATION MAY COMMIT TRESPASS**, and be held liable in an action therefor. *Brokaw v. New Jersey R. R. & Transp. Co.*, 659.
10. **LIABILITY OF CORPORATION FOR ACTS OF ITS SERVANTS OR AGENTS WILL DEPEND UPON** the same principles which govern the liability of a master for the acts of his servants. *Id.*
11. **CORPORATION WILL BE LIABLE FOR TRESPASS COMMITTED BY ITS AGENT**, if the act of the agent was authorized by the rules and regulations of the company, or was necessary to accomplish the purposes of his employment. In such a case, it will be liable even for his unnecessary violence. *Id.*
12. **AUTHORITY GIVEN BY BOARD OF DIRECTORS OF CORPORATION DOES NOT ALWAYS BIND IT.** To fix the liability of a corporation for the tortious act of one of its employees, done in obedience to the command of its officers, the act must be connected with the transaction of the business for which the company was incorporated. *Id.*
13. **CREDITOR OF CORPORATION WHICH WAS ESTABLISHED IN NEW YORK** under the statute of that state, which provides that stockholders and officers shall be personally liable as a penalty in certain contingencies, cannot maintain his action in Massachusetts to enforce his claim personally against a stockholder or officer of the corporation. *Halsey v. McLean*, 157.
14. **MUNICIPAL ORDINANCE MAY BE PUBLISHED AT ANY TIME** when the time of publication is not fixed by statute. *City of St. Paul v. Colter*, 278.

See CONSTITUTIONAL LAW; PLEDGE; TAXATION, 8.

COSTS.

1. COSTS OF BOTH PARTIES MAY BE CHARGED UPON ESTATE where there was probable cause for contesting the validity of a will, as shown by the conduct of the testator. *Clapp v. Fullerton*, 681.
2. IN ABSENCE OF POSITIVE ERROR SHOWN BY RECORD ON APPEAL, it will be presumed that the ruling of the lower court in refusing to retax costs was correct. A statement of facts in the brief of counsel will not supply the deficiency in the record. *Mitchell v. Bromberger*, 550.
3. CORRECTNESS OF COST BILL CANNOT BE REVIEWED UPON APPEAL when there is no statement or bill of exceptions, and the appeal is simply from the judgment, which shows no irregularity in the allowance of costs. *Howard v. Richards*, 520.
4. MOTION TO STRIKE OUT COST BILL, made long after the appeal is perfected, cannot be reviewed upon an appeal from the judgment, as the cost bill is no part of the judgment roll. *Id.*

CO-TENANCY.

1. ESSENCE OF TENANCY IN COMMON CONSISTS IN UNITY OF POSSESSION. It is the only unity required of tenants in common, and they hold by unity of possession. *Warfield v. Lindell*, 443.
2. POSSESSION OF ONE CO-TENANT WILL BE PRESUMED TO BE POSSESSION OF ALL. *Id.*
3. PRESUMPTION AS TO POSSESSION OF CO-TENANT. — One who enters into possession of land under deed making him a tenant in common with other parties will be presumed to have entered into possession under his deed, and by virtue of the title acquired thereby. *Id.*
4. QUESTION OF ACTUAL OUSTER IN FACT OF ONE CO-TENANT BY ANOTHER INVOLVES ACT, intent, and notice, and the jury must determine this from the evidence. Where the acts are inconsistent with the presumption of a tenancy in common, the intent may be found from the overt acts proved in the case. *Id.*
5. ONE TENANT IN COMMON MAY DISSEISE ANOTHER; but, in consequence of the legal presumption that the possession of one co-tenant is the possession of all, acts of exclusive possession which in case of a stranger would be deemed adverse, and *per se* a disseisin, are in cases of tenancies in common susceptible of explanation consistently with the real title. *Id.*
6. TO EFFECT DISSEISIN OF ONE TENANT BY HIS CO-TENANT, THERE MUST BE outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenant that an adverse possession and an actual disseisin are intended to be asserted against him. *Id.*
7. JURY WILL BE WARRANTED IN FINDING ACTUAL OUSTER OF TENANT BY HIS CO-TENANT, where the latter takes possession of the land and openly and notoriously exercises acts of exclusive ownership for a series of years, as by removing the soil, quarrying and selling rock, and by such acts as amount to the destruction of the thing itself, taking all the rents and profits without account, and by other acts which exclude the idea of his claiming as a co-tenant. *Id.*
8. AS TO OUSTER OF CO-TENANT, JURY MUST DETERMINE WHETHER EVIDENCE IS SUFFICIENT to overcome presumption in favor of a tenancy in common. Under evidence tending strongly to show an actual ouster, the jury is not bound to find, nor should the court instruct them to find, such ouster. *Id.*

9. **CONSTRUCTIVE OUSTER.** — NOTICE OF OUSTER TO CO-TENANT MAY BE CONSTRUCTIVE, by such open and notorious acts of ouster, or such an assertion of a claim to the exclusive possession of the whole land as in law will impart notice to the co-tenant of an adverse and exclusive claim of title. *Id.*
10. **PARTITION RECORD AND ANSWER IN EJECTMENT AS EVIDENCE OF OUSTER.** — Jury, in determining whether tenant has been actually ousted by his co-tenant, may consider the effect of a partition record against the plaintiff, and the answer in a prior ejectment suit, merely as a part of the facts and circumstances on which they may infer or presume an actual ouster, or the contrary. *Id.*
11. **ALL TENANTS IN COMMON MAY UNITE IN ONE ACTION** for the possession of the common property. And one tenant may sue for his undivided portion. But whether more than one and less than all can unite in such action, *quære*. *Bullion M. Co. v. Cræsus Gold etc. M. Co.*, 526.
12. **TROVER WILL LIE BY ONE CO-TENANT AGAINST ANOTHER** where the latter, being bound by contract to deliver and divide the joint property at a certain place, appropriates it to his exclusive use under a claim of exclusive right, and under circumstances which render a division and delivery in the manner agreed practically impossible. *Ripley v. Davis*, 262.

See POSSESSION.

CREDITORS' BILLS.

1. **CREDITOR'S BILL TO SET ASIDE FRAUDULENT CONVEYANCE** by a debtor will not lie until judgment has been obtained against the debtor. *Massey v. Gorton*, 237.
2. **CREDITOR'S BILL TO SUBJECT EQUITABLE ASSETS**, or choses in action, to the payment of a debt, will not lie until the creditor has obtained a judgment at law upon the debt, and execution thereon is returned *nulla bona*. *Vasser v. Henderson*, 351.

CRIMINAL LAW.

1. **LOTTERY.** — Where the proprietors of a public exhibition advertised to give away at their performance a large number of valuable presents to the spectators, the proprietor to appear upon the stage and call out numbers at random, and the person holding the ticket which corresponded with it to be given any of the prizes which the proprietor might select, this constitutes a lottery within the meaning of the statute; and it is not relieved of that character by the fact that the proprietor reserves the right to refuse to make any distribution at all, or to refuse to give a present to a person whose personal appearance did not suit him. *State v. Shorts and Tilney*, 668.
2. **CONSPIRACY.** — It is an indictable conspiracy for a number of employees to combine together to compel their employer to discharge certain of their fellow-workmen upon pain of their quitting his employment in a body and by a simultaneous act. *State v. Donaldson*, 649.
3. **CONSPIRACY.** — Conspiracy to defraud others of their property may in itself constitute an indictable offense, though the act done or proposed to be done in pursuance of the conspiracy is not in itself indictable; the purpose designed to be accomplished becomes punitive solely from the fact of the existence of a confederacy to effect such purpose. *Id.*

4. **CONSPIRACY.** — A combination will become an indictable conspiracy whenever the end proposed or the means to be employed are of a highly criminal character; or where they are such as indicate great malice in the confederates; or where deceit is to be used, the object in view being unlawful; or where the confederacy, having no lawful aim, tends simply to the oppression of individuals. *Id.*

See EVIDENCE, 6, 7.

CURTESY.

1. **TENANCY BY CURTESY EXISTS** only where there is a marriage, birth of issue, death of the wife, and a seisin, either actual or constructive, by the wife during coverture. The right of possession of uncultivated land draws to it the possession, if the land is not held adversely, and is a sufficient seisin to support the right of curtesy. Land held by a tenant at sufferance, or for years, or of any estate less than freehold, is deemed in the possession of the wife as reversioner. *Malone v. McLaurin*, 320.
2. **WIFE HAS NO SEISIN OF REMAINDER IN FEE, EXPECTANT UPON LIFE ESTATE**, if she dies before the determination of the life estate, and there can be no tenancy by the curtesy of such remainder or reversion. *Id.*

DAMAGES.

1. **DAMAGES TO BE RECOVERABLE MUST BE NATURAL AND PROXIMATE CONSEQUENCE** of the act complained of. *Clark v. Pacific Railroad*, 458.
2. **MEASURE OF DAMAGE FOR INJURY TO PROPERTY IS NOT ALWAYS SUM OF MONEY** which it would take to repair the injury, or to restore the property to the condition it occupied before the injury. In those cases where the cost of restoring it to its original condition will exceed its actual value, the value of the property, and not the cost of removing the injury, will be the proper measure of damage. *Harvey v. Sides Silver Mining Co.*, 510.
3. **MEASURE OF DAMAGES IN TROVER IS VALUE OF PROPERTY AT TIME OF CONVERSION**, with interest from that time, unless there are special circumstances which require a different measure of damages to be applied. *Ripley v. Davis*, 262.
4. **SPECIAL DAMAGES** cannot be recovered for negligence without proof of special injury or wrong. *Southern R. R. Co. v. Kendrick*, 332.
5. **NOMINAL DAMAGES** may be recovered without proof of special damages when negligence is shown to the wrong of plaintiff. *Id.*
6. **EXEMPLARY DAMAGES ARE IN DISCRETION OF JURY IN CASES OF PERSONAL WRONG**, and should not be awarded merely for a disregard of public duty, unless the circumstances of the case appear to the jury to justify or require such damages; when the neglect is unattended with circumstances of insult, injury, or suffering caused to plaintiff, vindictive damages should not be allowed. The existence and weight of such circumstances must be determined by the jury, if there is any evidence tending to show them. *Id.*
7. **JURY MAY CONSIDER SEX OF PARTY INJURED**, and the circumstances of peril and suffering undergone, in estimating damages. They may also consider the state, degree, quality, trade, or profession of either party. *Id.*
8. **JURY MAY CONSIDER PECUNIARY MEANS OF DEFENDANT** in adjusting the punishment, provided they think the facts proven render it proper to inflict vindictive damages for a disregard of public duty. *Id.*

See ATTACHMENT; COMMON CARRIERS; SLANDER, 4.

DEDICATION.

1. **PLAT OF VILLAGE ON WHICH BLOCK IS MARKED "PUBLIC SQUARE,"** executed, acknowledged, and recorded by one who did not own the property at the time, can have no effect as a dedication under a statute providing for the making, acknowledging, and recording of town plats by the proprietors, even though he afterwards became the owner, in the absence of subsequent circumstances estopping him from asserting the invalidity of the plat. *Lee v. Lake*, 220.
2. **MERE INEFFECTUAL ATTEMPT TO EFFORT STATUTORY DEDICATION CREATES** NO ESTOPPEL in favor of the public; and to raise such estoppel, it must appear that some act was done by the public subsequent to the making of the plat, and in reliance upon it, which would render it unjust for the proprietors afterwards to enforce a right of private ownership. *Id.*
3. **DEDICATION CANNOT BE MADE OUT WITHOUT CLEAR INTENT TO DEDICATE** on the part of the proprietor, and an acceptance of the property by the public. *Id.*

DEEDS.

1. **WHERE DEED HAS BEEN RECORDED, AND GRANTEE HAS CONVEYED LAND** as owner under the deed with the concurrence of the grantor, this amounts to a delivery, though the deed was made without the knowledge of the grantee, and was never actually delivered to him. *Jackson v. Cleveland*, 266.
2. **ABSENCE OF CONSIDERATION IN FACT IS NOT SUFFICIENT WITHOUT FRAUD OR MISTAKE** to raise a resulting trust in favor of a grantor who has conveyed by fee-simple deed reciting a valuable consideration. So held where a husband and wife, being about to separate, conveyed by such deed to a third person land of the husband in order to avoid questions of dower. *Id.*
3. **VOLUNTARY DEED PURPORTING TO BE FOR BENEFICIAL USE OF GRANTEE,** and made deliberately and without mistake or contrivance, is binding upon the grantor and his heirs, and can be avoided only by creditors and others having superior equities to the grantee. *Id.*
4. **COMMON-LAW RULE THAT FEOFFMENT WITHOUT CONSIDERATION,** and which declared no uses, created a resulting use to the grantor was merely technical, and not applicable, where a consideration, though nominal, was recited, or beneficial uses in favor of the grantee expressed. *Id.*
5. **IN CONSTRUING DEED, ALL PRIOR NEGOTIATIONS MUST BE TAKEN AS MERGED** in that instrument, the conclusive presumption being that the whole engagement of the parties, and the extent and manner of it, were reduced to writing. *Wells v. Jackson Iron Mfg. Co.*, 575.
6. **EVIDENCE OF ACTUAL INTENTION OF PARTIES OR OF SURVEYOR** is not admissible to affect the construction of a deed. *Id.*
7. **QUITCLAIM DEED FROM GRANTEE OF TAX COLLECTOR WILL BE COLOR OF TITLE,** and an entry under it will give the grantee possession of the whole tract described in it. *Id.*
8. **PAROL EVIDENCE IS ADMISSIBLE IN EQUITY TO SHOW THAT DEED ABSOLUTE ON ITS FACE** was in fact a mortgage, and so intended by the parties thereto. *Ryan v. Dox*, 696.
9. **EXECUTION OF DEEDS NEED NOT BE PROVED** where they are offered as part of a chain of title, and it appears from official certificates upon them that they have been regularly recorded. *Wells v. Jackson Iron Mfg. Co.*, 575.

10. EXCESSIVE DAMAGES, instance of verdict set aside on ground of. *Sawyer v. Hannibal etc. R. R. Co.*, 382.

See ADVERSE POSSESSION, 1; ATTACHMENT, 7; BOUNDARIES; EXECUTIONS; MARRIED WOMEN, 3, 4

DEMAND.

See NEGOTIABLE INSTRUMENTS, 25, 26.

DEPOSITIONS.

1. CAPTION OF DEPOSITION MUST STATE WHETHER OR NOT ADVERSE PARTY OBJECTED, even though he did not attend; and it is not sufficient to state that he attended on a subsequent day to which the caption was adjourned, and one deposition taken and did not object. *Wells v. Jackson Iron Mfg. Co.*, 575.
2. STATEMENT THAT ALL DEPONENTS BUT ONE APPEARED ON CERTAIN DAY, and that he appeared on the following day, and that each separately and severally made oath, etc., shows that each took the proper oath. *Id.*
3. IT IS SUFFICIENT TO SHOW PERSON TAKING DEPOSITION TO HAVE BEEN ACTING COMMISSIONER or notary public. *Id.*

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICILE.

1. PERSONAL PROPERTY IS GOVERNED BY LAW OF DOMICILE OF OWNER wherever it may be situated, and this law changes with his change of domicile. *Minor v. Caldwell*, 390.
2. CHARACTER OF PROPERTY, AS REAL OR PERSONAL, IS TO BE DETERMINED by the laws of the state into which it is removed. *Id.*

DOWER.

1. WIDOW WITH SEPARATE ESTATE EQUAL TO HER SHARE OF HUSBAND'S ESTATE HAS NO DOWER under the law of Mississippi. *Magee v. Young*, 322.
2. RIGHT OF DOWER IS INCHOATE, AND NOT VESTED, until after the death of the husband, leaving a surviving wife. Such inchoate right is a mere possibility, and not an estate. *Id.*
3. CONSTITUTIONAL LAW. — VESTED RIGHTS ARE NOT IMPAIRED BY CHANGE IN LAW OF DOWER during the lifetime of the husband; nor by a change in the husband's rights to such choses in action of the wife as have not been reduced to possession during coverture. *Id.*
4. RIGHT OF DOWER IS NOT FOUNDED IN CONTRACT, but results from marriage as a legal incident thereto, and may be controlled by the legislature as a subject-matter of public policy. *Id.*
5. INCHOATE RIGHT OF DOWER IN WIFE IS SUFFICIENT ESTATE TO ENTITLE HER TO MAINTAIN BILL IN EQUITY to redeem lands from a mortgage in which she had joined with her husband. *Davis and Wife v. Wetherell*, 177.

EJECTMENT.

1. ENTRY ON LAND BY PLAINTIFF'S GRANTOR GIVES HIM SUCH SEISIN as to enable him to maintain a writ of entry against a defendant who shows no evidence of title. *Wells v. Jackson Iron Mfg. Co.*, 575.

2. **WHERE PENDING ACTION IN EJECTMENT** against several defendants holding distinct parcels of property plaintiff sells to one of such defendants, the latter may continue the suit as plaintiff against the other defendants. But it must be the same suit, and for the property claimed by the first plaintiff, and not for that and other property claimed by the last plaintiff, and united by an amended complaint to that originally sued for. *Bullion Mining Co. v. Croesus Gold and Silver Mining Co.*, 526.
3. **MERE NAKED TRESPASSER CANNOT SHOW OUTSTANDING TITLE IN EJECTMENT** as against one claiming by virtue of prior possession; but such trespasser can show that the plaintiff, or those from whom he derives title, has parted with his right of possession by conveyance, or lost it by abandonment. *Mallett v. Uncle Sam Gold and Silver Mining Co.*, 484.
4. **WHERE JUDGMENT IS RECOVERED FOR PART** of an undivided parcel of real property, plaintiff cannot expel the defendants from the possession of the whole tract if they have quietly submitted to a common or joint occupancy by the plaintiff with themselves. *Bullion M. Co. v. Croesus Gold M. Co.*, 526.
5. **PLAINTIFF CANNOT RECOVER** nor be put in possession of premises not described in the complaint, judgment, nor execution. *Id.*
See CO-TENANCY, 12.

EMINENT DOMAIN.

1. **PREROGATIVES OF TAXATION AND OF EMINENT DOMAIN** may be resorted to by the legislature for the purpose of reclaiming a vast tract of land and making it fit for habitation and use. *Tide Water Co. v. Coster*, 634.
2. **WHETHER ENTERPRISE OR SCHEME OF IMPROVEMENT** is of such public utility as to justify a resort for its furtherance to the exercise of the power of taxation or eminent domain is for the legislature to decide. Primarily the judiciary has no concern in such matter. *Id.*
3. **CONTRACT FOR IMPROVEMENT OF LAND** authorized by the legislature is illegal and void, unless all of the land-owners assent, if the compensation for the work contracted for is made to turn in any degree whatever on the future value of the land, and which by any possibility could be in evident excess of the real cost of the improvement. *Id.*
4. **IN PROCEEDINGS TO EFFECT PUBLIC IMPROVEMENT**, the assessment of expenses on the property to be improved must not exceed the value of the benefit conferred upon the land-owner; and in case the expense of improvement does exceed the benefits conferred, indemnification to the owner of the land subjected to the operation of the law must be made for the excess, or the law is void. *Id.*
5. **COST OF PUBLIC IMPROVEMENT OF LAND** under legislative action may, to a certain degree, be imposed upon the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage. But the benefit must be commensurate to the burden, and in the event of an excess of expenses imposed over benefits received, private property is *pro tanto* taken for public use without compensation. *Id.*

EQUITY.

1. **COMPLAINANT CAN RECOVER ONLY ON CASE MADE BY HIS BILL**; and he is entitled to no relief on equities brought into the case only by subsequent pleadings or by evidence. *Converse v. Blumrich*, 230.

2. WHERE TWO PERSONS ARE EQUALLY INNOCENT, AND ONE IS BOUND TO KNOW and act upon his knowledge, and the other has no means of knowledge, the latter will not be compelled to bear a loss for the purpose of exonerating the former. *Stout v. Benoist*, 466.
 3. EQUITY WILL TAKE JURISDICTION TO PREVENT MULTIPLICITY OF SUITS. Where a pledgor's bill of complaint seeking a return of pledged stock also prays for an account of receipts and dividends, equity has jurisdiction, though the law could afford a remedy by *assumpsit* if a recovery of the receipts and dividends were sought alone, particularly where it would require a multiplicity of suits at law to effect the relief asked by the bill. *Bryson v. Rayner*, 69.
 4. CREDITOR'S RIGHT TO MARSHAL SECURITIES IS ABSOLUTE AGAINST DEBTOR HIMSELF, and cannot be impaired or affected by the subsequent intervention of other creditors. *Herbert v. Mechanics' Building and Loan Association*, 601.
 5. EQUITY OF SECOND MORTGAGEE TO HAVE SECURITIES MARSHALED, so that the debt of the first mortgagee shall be paid primarily out of shares of stock assigned to the first mortgagee as collateral security, cannot be impaired or affected by the subsequent intervention of judgment creditors of the mortgagor in levying upon the shares of stock. *Id.*
 6. INSERTION OF PRAYER FOR REMOVAL OF ADMINISTRATORS IN BILL filed in aid of proceedings at law to remove the administrators for the purpose of having a receiver take charge of the assets pending the legal proceedings, being inconsistent with the case made by the bill, cannot change the ancillary nature of the suit. *Lewis v. Campion*, 245.
- See BANKS AND BANKING, 1; CREDITORS' BILLS; ESTOPPEL; INTEREST, 2; JUDGMENTS; STATUTE OF FRAUDS, 5, 6.

ESTATES.

ESTATE SO LIMITED THAT IT MAY BY POSSIBILITY EXTEND BEYOND LIFE OR LIVES IN BEING at the time of its commencement, and twenty-one years and a fraction of a year (to cover the period of gestation) afterwards, during which time the property would be withdrawn from the market or the power over the fee suspended, is a perpetuity, and void as against the policy of the law, which will not permit property to be inalienable for a longer period. *Barnum v. Barnum*, 88.

See CURTESY; DOWER.

ESTATES OF DECEDENTS.

See NEGOTIABLE INSTRUMENTS, 19; WILLS.

ESTOPPEL.

1. TO CONSTITUTE ESTOPPEL IN PARS, there must be an admission inconsistent with the claim set up, an action by the other party upon such admission, and an injury to him by allowing the admission to be disproved. *Newman v. Hook*, 378.
2. WHERE PARTY BY WORDS OR ACTS INDUCES ANOTHER TO BELIEVE in the existence of a certain state of facts, and to act upon that belief so as to alter his condition, he will be estopped from alleging to the contrary against the party who has thus altered his condition. *Chouteau v. Goddin*, 462.

See DEDICATION.

EVIDENCE.

1. IF EVIDENCE IS ADMISSIBLE FOR ANY PURPOSE in the inquiry before the jury, it would be error to exclude it as irrelevant and inadmissible under the general exception. *Wilms v. White*, 113.
 2. MARKET REPORTS IN NEWSPAPERS, SUCH AS COMMERCIAL WORLD RELY UPON, are competent as evidence of state of markets. Such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries. *Steele v. Cleveland etc. R. R. Co.*, 252.
 3. COURT WILL TAKE JUDICIAL NOTICE THAT CERTAIN PERSON WAS GOVERNOR of the state at a certain date, and of the genuineness of his signature. *Wells v. Jackson Iron Mfg. Co.*, 575.
 4. TESTIMONY HAVING BUT SLIGHT BEARING UPON CONTROLLING EVIDENCE IN CASE may be properly rejected by the court. *State v. Staples*, 565.
 5. ANSWERS OF WITNESS IN WRITING, UNDER OATH, MADE AT PREVIOUS EXAMINATION, ARE ADMISSIBLE AGAINST him in a subsequent proceeding, although not signed by him, and with the understanding that they were first to be submitted to his attorney for correction before signing and filing. *Lynde v. McGregor*, 183.
 6. TESTIMONY OF WITNESS THAT ACCUSED OFFERED TO PAY HIM FOR ASSISTANCE in defeating criminal prosecutions pending against him is admissible against the defendant, if the language used by him can be fairly inferred to embrace the charge upon which he is being tried, among other cases that he had in mind at the time he uttered it. *State v. Staples*, 565.
 7. TESTIMONY AT PREVIOUS TRIAL OF WITNESS WHO IS LIVING, and within the jurisdiction of the court, is not admissible in a criminal proceeding. *Id.*
- See AGENCY, 8; AUCTIONS; BOUNDARIES; COMMON CARRIERS, 20; CONSTITUTIONAL LAW, 15; DEEDS, 5, 7, 8; DEPOSITIONS; LIBEL, 3; MISTAKE, 2; NUBANCE; PLEADING AND PRACTICE; STATUTE OF FRAUDS; WILLS.

EXECUTORS AND ADMINISTRATORS.

1. PURCHASE BY ADMINISTRATOR AT HIS AUCTION SALE OF REALTY OF DECEASED will not be held void at law where no repayment has been made or tendered of the purchase-money, and no express or actual fraud is shown. But by a proper proceeding in equity, such sales will always be set aside. *Yeackel v. Litchfield*, 207.
2. ALLOWANCE BY PROBATE COURT OF ANOTHER STATE OF CLAIM OF ANCILLARY ADMINISTRATOR THERE, resident of this state, which allowance was greater than the assets in his hands, is not conclusive upon the heirs here. *Ella v. Edwards*, 174.
3. EXECUTOR WHO SUES IN HIS OWN NAME, BUT NOT AS EXECUTOR, cannot recover on a note payable to his testator, but not indorsed by him. *Woodbury v. Woodbury*, 555.

See EQUITY, 4; WILLS.

EXECUTIONS.

1. WHEN WRIT OF EXECUTION ISSUED TO CORONER BECAUSE OF VACANCY IN OFFICE OF SHERIFF is turned over unexecuted to the new sheriff after AM. DEC. VOL. XC—52

- he has been appointed and has qualified, he may make a valid levy and sale thereunder. *Carr v. Youse*, 470.
2. ACT ESTABLISHING COURT OF COMMON PLEAS IN CITY OF HANNIBAL required transcript of justice's judgment to be filed in clerk's office both of the Marion circuit court and of the Hannibal court of common pleas before it should become a lien, and before an execution should be issued thereon by the clerk of the latter court. *Id.*
 3. CERTIFICATE OF JUSTICE OF PEACE THAT EXECUTION HAS BEEN ISSUED upon a judgment rendered by him, and has been returned *nulla bona*, is not admissible in evidence. The fact must appear from the certified copy of the execution and of the officer's return thereto. *Id.*
 4. IN ORDER THAT SHERIFF MAY PASS TITLE TO PERSONAL PROPERTY by a levy and sale under execution, he must actually seize the property, so as to be able to deliver possession. *Newman v. Hook*, 378.
 5. CONSTABLE'S SALE MAY BE COLLATERALLY ATTACKED by showing that the certificate of sale falsely states the particular property sold. *McDonald v. Prescott and Clark*, 517.
 6. OFFICER MAY GENERALLY JUSTIFY UNDER EXECUTION regular on its face, but he must show both judgment and execution, when he levies on property which has been sold by defendant in execution, so as to make the sale good as between him and his vendee, but not good as against creditors, as where there has been a *bona fide* sale but no delivery. *Id.*
 7. RECITALS IN SHERIFF'S DEEDS ARE CONCLUSIVE as between the parties to them and those claiming under them, and cannot be contradicted by parol evidence showing that the land was sold under a different judgment and execution than those recited in the deed. *Zabriske v. Meade*, 542.
 8. PURCHASER AT SHERIFF'S SALE OF REAL PROPERTY under execution gets only such interest as the judgment debtor possessed. If the judgment debtor has nothing, the purchaser gets nothing, and the sale is a nullity. *Id.*

EXEMPTIONS.

LEGISLATURE HAS POWER TO CHANGE EXEMPTION LAWS according to its own views of policy and humanity so as to affect the remedy upon existing contracts, but not to the extent to render it nugatory or impracticable. *Stephenson v. Osborne*, 358.

EXPERTS.

See WITNESSES, 4, 5.

EX POST FACTO LAWS.

See CONSTITUTIONAL LAW.

FIXTURES.

1. BUILDING IS NOT PART OF REALTY WHEN AGREEMENT OR EQUITABLE CIRCUMSTANCES make it the property of another than the owner of the realty. *Hamlin v. Parsons*, 284.
2. TROVER LIES FOR FIXTURE REMOVED without the consent of the owner of the land. The rights of the owner of a conditional estate in the premises as mortgagee or otherwise differ only in extent from those of the owner of the land, and will be protected from invasion. *Id.*

FORGERY.

See NEGOTIABLE INSTRUMENTS, 24.

FRAUD.

ONE WHO OBTAINS PROPERTY OF ANOTHER BY MEANS OF UNTRUE STATEMENTS, though in ignorance of their falsity, must be held responsible as for a legal fraud; for the court must look at the effect of untrue statements upon the person to whom they are made rather than to the corrupt motive of the one making them. *Converse v. Blumrich*, 230.

See AGENCY, 2; DEEDS, 1-4; FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCES.

1. DEED BY ONE IN DEBT TO HIS WIFE AND CHILDREN FOR NOMINAL CONSIDERATION IS FRAUDULENT and void as to subsequent creditors, where the grantor remains in possession without apparent change of ownership, and continues in business, paying past indebtedness by obtaining new credit, and contracting new debts until he fails in business. *Savage v. Murphy*, 733.
2. IT IS FRAUD FOR OWNER OF PROPERTY, AFTER ATTEMPTING TO PLACE IT BEYOND REACH OF HIS CREDITORS, to try to obtain a new credit by means of continued possession and apparent ownership. *Id.*
3. TRANSFER OF INDEBTEDNESS IS NOT PAYMENT; as where one in debt transfers his property to his wife and children, but remains in possession, having the apparent ownership and continuing in business; the fact that he paid up all indebtedness existing at the time of the transfer by means of credit obtained afterward is only a transfer, and not a payment of the then existing indebtedness. *Id.*
4. JUDGMENT CREDITOR MAY SET ASIDE FRAUDULENT CONVEYANCE which prevents the legal lien of the judgment from operating upon the property, without the return of execution *nulla bona*. The creditor need only proceed at law so far as to obtain a complete title, and a judgment which acts as a lien upon the property sought to be charged would be sufficient. *Vasser v. Henderson*, 351.
5. INSOLVENCY OF CO-JUDGMENT DEBTORS NEED NOT BE AVERRED in a bill to set aside a fraudulent conveyance of one insolvent judgment debtor, if execution has been levied upon the property fraudulently conveyed. To justify such levy, it is not necessary to show that there is no other property which cannot be levied upon. Though property fraudulently conveyed may be sold under execution at law, yet equity will not require the creditor to sell a doubtful or obstructed title, but will set aside the conveyance, and remove the obstruction to a fair sale. *Id.*
6. VOLUNTARY CONVEYANCE IN VIEW OF GRANTOR'S FUTURE INDEBTEDNESS, and with an intent to place his property beyond the reach of his creditors, is fraudulent as against the creditors, and will be set aside. *Cramer v. Reford*, 594.

See CREDITORS' BILLS.

GARNISHMENT.

See ATTACHMENT.

GUARDIAN AND WARD.

GUARDIAN BY IMPROVIDENTLY INVESTING WARD'S MONEY IN NOTE ON SINGLE PERSON renders the sureties on his bond liable for any loss that

may occur, although he dies and the borrower becomes administrator of his estate, and in settling the account of his intestate as guardian returns the note as assets of the ward's estate. *Richardson v. Boynton*, 141.

HIGHWAYS.

1. OBJECT IN HIGHWAY, SUCH AS SMALL PILE OF GRAVEL, WITH WHICH TRAVELER DOES NOT COME IN CONTACT or collision, and which is not shown to have been a natural encumbrance or obstruction in the way of travel, is not to be deemed a defect for the sole reason that it was of a nature to cause a horse to take fright, to escape from his driver, and do damage. *Kingsbury v. Dedham*, 191.
2. FAILURE TO KEEP PUBLIC HIGHWAY IN REPAIR MAKES PARTY BOUND TO REPAIR LIABLE to an action at the suit of any one who sustains special damage from want of such repair. *Robinson v. Chamberlain*, 713.
3. CANAL IS PUBLIC HIGHWAY, AND IF CONTRACTOR EMPLOYED BY STATE TO KEEP IT in proper condition and repair neglects his duty, whereby an individual sustains special damage, he is liable to an action at the suit of the party injured. *Id.*

HOMESTEADS.

PLEADING HOMESTEAD IN BILL TO REDEEM. — Where plaintiff claiming a homestead interest seeks to redeem, and alleges in his bill that the premises were a part of his homestead farm, though separated from his dwelling by lands of another, and that he acquired an estate of homestead in the premises under the statute, the pleading is good. *Davis and Wife v. Wetherell*, 177.

HUSBAND AND WIFE.

1. ANTENUPTIAL AGREEMENT WHEREBY WIFE MAKES OVER TO HER HUSBAND in consideration of the marriage certain of her lands and property, on the condition that if he shall survive her he will pay over certain sums and property to the child or children which she may leave, and if she leave more than one child, that he will distribute and pay over such sums and property among all said children, share and share alike, is broad enough to include all the children of the covenantor or *cestui que trust*, whether they were born before said marriage and were the issue of a former marriage, or were born thereafter. *Michael v. Morey*, 106.
2. MARRIAGE IS VALUABLE CONSIDERATION, AND WILL NOT ONLY SUSTAIN COVENANTS in favor of the wife and the issue of the marriage, but also covenants for settlements in favor of children of a former marriage, as a moral consideration. *Id.*
3. UNDER CONTRACT IN CONSIDERATION OF MARRIAGE, containing covenants in favor of issue of the marriage, the children are regarded as purchasers; they may enforce the obligations of the contracting parties, notwithstanding the non-performance of mutual stipulations on the other side, unless they are conditional and dependent covenants. *Id.*
4. WHERE WIFE MORTGAGES HER SEPARATE ESTATE TO RAISE MONEY FOR HER INSOLVENT HUSBAND, NOT KNOWING HIM TO BE SUCH, and where he fraudulently and with intent to defraud his creditors, and collusively with the mortgagee, spends large sums of money in building upon and improving his wife's land, the husband's assignee in insolvency cannot recover from her for sums of money so expended within the amount of the mortgage, but can recover for other sums expended, and which in-

creased the value of the land, but only to the extent of such increase. *Lynde v. McGregor*, 188.

5. DEED OF SEPARATION MADE BETWEEN HUSBAND AND WIFE IS ONLY VALID when made through the agency of a trustee acting for the wife, and when so made is binding alone upon the husband and trustee. *Stephenson v. Osborne*, 358.
 6. HUSBAND AND WIFE SHOULD JOIN IN WRIT OF ENTRY to recover possession of land which was conveyed to them both during their natural lives. *Wentworth and Wife v. Remick*, 573.
 7. WIFE'S EARNINGS DURING COVERTURE BELONG TO HUSBAND, and he cannot as against his creditors give or agree to give them to her. *Cramer v. Reford*, 594.
 8. REAL ESTATE PURCHASED WITH WIFE'S EARNINGS DURING COVERTURE BELONGS TO HUSBAND, and is subject to be taken for his debts. *Id.*
- See CURETSEY; DOWER; FRAUDULENT CONVEYANCES; MARRIED WOMEN; WITNESSES, 1, 2.

INFANCY.

See GUARDIAN AND WARD.

INSOLVENCY.

See FRAUDULENT CONVEYANCES, 5; NEGOTIABLE INSTRUMENTS, 5.

INSURANCE.

1. INSURED DOES NOT COME TO HIS DEATH IN KNOWN VIOLATION OF LAWS OF LAND, within the meaning of a policy of life insurance containing a clause that in case the insured should die in the known violation of any law of the state, or of the United States, or of any government where he might be, the policy should be void, where he is killed in a personal rencontre while acting in the lawful defense of his person, when he had reasonable cause to apprehend a design on the part of his adversary to do him a great personal injury, and did apprehend immediate danger of such design being accomplished. If he had killed his adversary under such circumstances, it would have been a case of justifiable homicide under the statute of Missouri, and not a violation of the law. *Overton v. St. Louis Mutual L. Ins. Co.*, 455.
2. INSURANCE UPON BUILDING COVERS IT AS SUCH, and not the materials composing it. And the insurer is not liable for the loss where the building falls from defect of construction or from overloading, and the materials are subsequently burned. *Nave v. Home Mutual Ins. Co.*, 394.
3. MORTGAGOR OF VESSEL SELLING HIS REMAINING INTEREST, and stipulating with the purchaser that he, the seller, will pay off the mortgage if he fails to comply with the stipulation, so that the bargain is given up and the title reconveyed to him, may recover on a policy of insurance issued to him before his agreement of sale for a loss to the vessel after reconveyance; and this whether the contract be construed to have passed title or not. *Worthington v. Bearse*, 152.
4. INSURANCE POLICY UPON GOODS WILL NOT BE DISCHARGED BY EXECUTORY CONTRACT FOR SALE thereof, in which there has been a receipt of a portion of the purchase-money, if the title to the goods at the time of the loss remains in the person insured; and his right to recover will not be limited to the balance of purchase-money remaining due. *Boston etc. Ice Co. v. Royal Ins. Co.*, 151.

5. GENERAL AGENT OF INSURANCE COMPANY MAY WAIVE CONDITION in policy that until actual payment of the premium the insurance shall not be considered as binding; and delivery of the policy without exacting prepayment of the premium is evidence of an intention to give credit. *Bochen v. Williamsburg C. I. Co.*, 787.

INTEREST.

1. COMPOUND INTEREST IS NOT SANCTIONED by the Nevada act "in relation to money of account and interest." *Cox v. Smith*, 476.
2. CONTRACTS FOR FUTURE COMPOUND INTEREST WILL NOT BE ENFORCED IN EQUITY, nor, it seems, at law. *Id.*
3. NOTE BEARS INTEREST AFTER MATURITY AT RATE STIPULATED, where it provides that interest shall continue to run on the principal sum until paid. *Id.*
4. BOND IN PENAL SUM DOES NOT CARRY INTEREST, but interest on such sum may be added by way of damages for the detention thereof, after it is the duty of a surety to pay the same. *Bank of Brighton v. Smith*, 144.

JUDGMENTS.

1. ORDER APPOINTING RECEIVER IS IN EFFECT FINAL DECREE, though purporting to be interlocutory, and is therefore appealable where it is made upon a bill filed in aid of proceedings at law to remove administrators and praying the appointment of a receiver to take charge of the assets until the termination of the proceedings at law. *Leavis v. Campan*, 245.
2. DIFFERENCE BETWEEN INTERLOCUTORY AND FINAL DECREES is that in the former some further steps are required to be taken to enable the court to adjudicate and settle the rights of the parties, while under a final decree the party obtains his rights without any further adjudication on the merits, either by the direct operation of the decree itself, or by means of proceedings of a ministerial character in execution of it. *Id.*
3. DECREE TO BE FINAL NEED NOT DISPOSE OF ALL MERITS; but whenever the court finally adjudicates any part of them, although the practice of making separate decrees without necessity is very reprehensible, yet the partial decree is neither void nor interlocutory. *Id.*
4. PARTY IS NOT TO BE DEBARRED FROM HIS RIGHT OF APPEAL FROM FINAL DECREE merely because it is partial and prematurely made. *Id.*
5. DECREES OF PROBATE COURTS, within the authority conferred upon them by law, are conclusive upon the courts of common law, and cannot be reversed by writ of error or *certiorari*; nor can they be set aside in equity even for fraud; but they may be revoked or repealed for good cause, as for fraud or mistake, by the court which granted them. *Waters v. Stickney*, 122.
6. MISTAKE IN AMOUNT FOR WHICH JUDGMENT SHOULD BE RENDERED should be corrected by motion in the lower court, and cannot properly be raised on appeal for the first time. The court, however, in this case deemed it their duty to correct the error, but imposed appeal costs upon appellant. *Howard v. Richards*, 520.
7. JUDGMENT WILL NOT BE SET ASIDE ON APPEAL for errors committed at the trial which it appears were not prejudicial to appellant. *Mitchell v. Bromberger*, 550.
8. IN ACTION IN ONE COUNTRY FOR DEBT MADE PAYABLE IN ANOTHER, the plaintiff is entitled to receive the full sum necessary to replace the money

- in the country where it ought to have been paid, and to this end is entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between those countries added to or subtracted from the amount, as the case may require, in order to replace the money in the country where it ought to be paid. *Marburg v. Marburg*, 88.
9. WHERE FOREIGN MONEY OR DEBT DUE IN SUCH MONEY IS OBJECT OF SUIT, its value should be computed according to the rate of exchange at the time of trial or judgment. *Id.*
 10. DEBT MERGES IN JUDGMENT RECOVERED UPON IT, in Maryland, and its specific character as a foreign debt is thereby lost; the judgment presumptively ascertains the liability of the debtor according to the law of the contract, and by its recovery the debt becomes a domestic debt of record, in all respects subject to the law of the forum. *Id.*
 11. BY EXPRESS PROVISION OF STATUTE IN MARYLAND, COURT OF APPEALS has no power to reverse a judgment upon the ground that it is entered for a larger sum than is claimed in the declaration. *Id.*
 12. SUMMONS MUST BE AFFIRMATIVELY SHOWN TO HAVE BEEN SERVED UPON DEFENDANT WITHIN TERRITORIAL JURISDICTION OF JUSTICE before a judgment by default founded thereon can be introduced in evidence to establish rights claimed to be acquired under it. *Mallett v. Uncle Sam Mining Co.*, 484.
 13. JUDGMENT UPON PLEADINGS for plaintiff cannot be sustained if the answer, qualified by an offer of proof upon the trial, sets up a defense. *Lamberton v. Windom*, 301.
- See BONA FIDE PURCHASERS; FRAUDULENT CONVEYANCES, 4, 5; JURISDICTION.

JUDICIAL NOTICE.

See EVIDENCE, 3.

JURISDICTION.

1. FACTS NECESSARY TO CONFER JURISDICTION MUST BE AFFIRMATIVELY SHOWN where any rights are claimed under or by virtue of the judgment of a court of special and limited jurisdiction. *Mallett v. Uncle Sam Gold and Silver Mining Co.*, 484.
2. NO PRESUMPTION IS MADE IN FAVOR of the jurisdiction of justices' courts, or courts of inferior jurisdiction. *McDonald v. Prescott and Clark*, 517.
3. MERE RECITAL IN JUSTICE'S JUDGMENT that summons was duly served is not sufficient to establish jurisdiction, and in such case the party claiming under the judgment must produce the summons and return thereon, together with the transcript of the justice's docket, to show jurisdiction. *Id.*

See JUDGMENTS.

JURY AND JURORS.

1. TRAVERSE JUROR IS NOT COMPETENT WITNESS TO PROVE misbehavior in the jury. *Sawyer v. Hannibal etc. R. R. Co.*, 382.
2. AMOUNT OF VERDICT IS IMPROPERLY MADE UP where each juror names a certain sum, and the aggregate of the sums specified is divided by the number of the jury. *Id.*

See CONTEMPTS, 2, 3; LIBEL; PLEADING AND PRACTICE; QUESTIONS OF LAW AND FACTS.

JUSTICES OF PEACE.

See JURISDICTION, 2, 3.

LANDLORD AND TENANT.

See VENDOR AND VENDEE, 1, 5.

LIBEL.

1. **TO RECOVER IN ACTION OF LIBEL WHERE COMMUNICATION IS PRIVILEGED**, the plaintiff must prove affirmatively not only the falsehood of the communication, but that it was published with express malice. *Edwards v. Chandler*, 249.
2. **TRUTH OF COMMUNICATION IN ACTION OF LIBEL IS MERELY CONTRADICTION OF ESSENTIAL PART** of plaintiff's case where the communication is privileged, and proof thereof may therefore be introduced under the general issue without resort to a special plea or notice. *Id.*
3. **PLAINTIFF IS NOT BOUND TO PROVE FALSITY OF LIBEL CHARGED** if it is not privileged; and the justification of it as true is therefore not a denial of anything incumbent upon the plaintiff to prove, is strictly in avoidance, and must be pleaded or noticed specially. *Id.*
4. **IT IS FOR JURY TO DETERMINE WHETHER, IN ACTION OF LIBEL, ENGLISHMENT IS CHARGED** by a letter which, after accusing the plaintiff of vexatious acts, and with charging larger than the usual rates, contained the following language: "It is wondered at how he can live in more than ordinary style, as he does, while having merely the honorable receipts of his agency to live upon." And an instruction that if such was their inference from the language in the letter they would be warranted in drawing it, is not erroneous as tending to mislead them into supposing it to be an obligatory inference. *Id.*

LICENSES.

See CONSTITUTIONAL LAW, 10-14.

LIQUORS.

See CONSTITUTIONAL LAW, 73.

LOTTERIES.

See CRIMINAL LAW, 1.

MALICIOUS PROSECUTION.

See CORPORATIONS, 9.

MARKET REPORTS.

See EVIDENCE, 2.

MARRIAGE AND DIVORCE.

1. **MARRIAGE IS NOT CONTRACT, WITHIN MEANING OF CONSTITUTION**, which prohibits the passage of laws impairing the obligation of contracts; but is an institution of the state, founded on reasons of public policy. *Magee v. Young*, 322.
2. **IN ACTION FOR DIVORCE ON GROUND OF ADULTERY**, where the defense set up is the counter-charge of adultery, the facts constituting such defense must be fully and plainly set forth in the answer. *Jones v. Jones*, 607.

3. IN ACTION FOR DIVORCE ON GROUND OF ADULTERY, the court cannot entertain any matter not properly put in issue, on the ground that public policy and public morals require it. *Id.*
4. ACT OF ADULTERY COMMITTED BY HUSBAND, and forgiven for years, should not be held to compel him to submit without redress to the faithlessness and unrestrained profligacy of his wife. *Id.*
5. WHERE PARTY COMMITTING ADULTERY is received back and forgiven, the marriage contract is renewed, and begins as *res integra*, and it is for the party, and not the court, to forgive a new offense of like character. *Id.*

MARRIED WOMEN.

1. MARRIED WOMAN, AS GENERAL RULE, CAN MAKE NO CONTRACT, and exceptions to the rule must be created by positive law. She cannot release or convey her claims on her husband's estate in consideration of a separation, nor bind herself by the covenants of her trustee in a deed of separation. *Stephenson v. Osborne*, 358.
2. WHERE MARRIED WOMAN BOUGHT ARTICLES FOR FAMILY USE from time to time, paying for them partly with her own earnings and partly with money furnished by her husband, and not discriminating or separating part of the property as her own from the rest, and there being nothing in the articles themselves to indicate that they were for her personal and exclusive use, it would be *prima facie* evidence that she did not claim or have any separate title or exclusive right in any portion of them. *Kelly v. Drew*, 138.
3. BASIS OF COMMON-LAW DISABILITY OF MARRIED WOMEN rests upon the peculiar disqualifications and burdens of the wife, and not upon any essential element of coverture; and therefore the removal of these disqualifications removes all the reasons which ever required the intervention of equitable trusts in the case of grants between husband and wife. *Burdeno v. Amperse*, 225.
4. HUSBAND MAY CONVEY LAND TO WIFE DIRECTLY WITHOUT INTERVENTION OF TRUSTEE where the statutes give power to a married woman to enjoy, contract, sell, transfer, mortgage, convey, devise, or bequeath her property in the same manner and with the like effect as if she were unmarried. *Id.*

See DOWER: HUSBAND AND WIFE; WITNESSES, 1.

MARSHALING SECURITIES.

See BONA FIDE PURCHASERS: EQUITY, 5, 6.

MASTER AND SERVANT.

1. FELLOW-SERVANT, INJURY THROUGH ACT OF, WHO LIABLE — Servant, on entering master's service, assumes all the risks of that service which the master, exercising due care, cannot control, including negligence of fellow-servants. But master is bound to exercise ordinary care in providing suitable machinery and proper servants to carry on his business, and is liable to other servants for his neglect so to do. *Gilman v. Eastern R. R. Co.*, 210.
2. FELLOW-SERVANTS. — If master knows, or by the exercise of due care might have known, that servants employed by him are incompetent, either at the time of employing them or at any subsequent time while they are in his employ, he is liable for their incompetence causing damage to their fellow-servants. *Id.*

3. **FELLOW-SERVANTS, LIABILITY OF EMPLOYER FOR ACTS OF.** — Where a flagman employed by a railroad company is an habitual drunkard, and is usually employed to manage a switch, and where the fact of his drunkenness is known to the officers of the company, or by due care might have been known to them, and he, while intoxicated, misplaces a switch whereby another employed by the railroad company is injured, the company is liable, although it was the duty of another person to manage the switch, and although a proper local agent is employed to superintend the employees of the company, and due care was exercised in the selection of the flagman when he was first employed. *Id.*
4. **EVIDENCE.** — WHERE PLAINTIFF WAS INJURED THROUGH ALLEGED INTemperance OF SWITCHMAN IN DEFENDANTS' EMPLOY, and it is claimed that he is habitually intemperate, evidence that that is his general reputation is admissible to show that the defendants, if they used due care, might have known that he was habitually intemperate, and therefore an unsuitable servant to be employed by them. *Id.*

See NEGLIGENCE.

MINES AND MINING.

1. **MINING LAWS OF DISTRICT WHERE MINE IS LOCATED WILL GOVERN** in the location and working of mines; and when such laws directly point out how mining claims must be located, and how the possession once acquired is to be maintained, that course must be strictly pursued. *Mallett v. Uncle Sam Gold and Silver Mining Co.*, 484.
2. **TITLE PRESUMED BY COURTS IN FIRST APPROPRIATOR OF MINING CLAIM** can only be a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired. *Id.*
3. **MINER LOCATING CLAIM, IT SEEMS, WOULD HOLD ONLY BY ACTUAL OCCUPANCY**, and by such work for the development of the mine as would under all the circumstances be deemed reasonable, and his right of possession would only be continued by occupancy and use, where there is an absence of mining laws, and where the miner's right rests solely upon his possession. *Id.*
4. **WHERE MINER HAS SURFACE LOCATION**, together with a lode following its dips, spurs, and angles, he is entitled to the surface and the lode wherever it may go, so far at least as it may extend under the public land. *Bullion M. Co. v. Ceresus Gold M. Co.*, 526.
5. **WHERE MINER LOCATES LEDGE** without any surface location, he is only entitled to the ledge. *Id.*
6. **WHERE MINER LOCATES LEDGE** the outlines of which are visible on the surface, he is entitled to the surface. *Id.*
7. **WHERE BLIND LEDGE SEVERAL HUNDRED FEET BELOW SURFACE** is located without any surface location, the locator is not entitled to any surface. *Id.*
8. **MINER MAY FOLLOW HIS LODGE** wherever it may go, even though it runs under public lands which were in the occupancy of another before the mine was located, but the latter is entitled to protection in the use of his surface location. *Id.*
9. **COMMON-LAW DOCTRINE THAT RIGHT TO SURFACE OF EARTH** gives a right to all beneath and above that surface has but a limited application to the rights of miners and others using the public lands of Nevada. The well-established customs of miners to locate veins of mineral, claiming

to follow them with all their dips, spurs, and angles, without reference to the occupancy of the surface, has compelled a departure from common-law rules. *Id.*

10. JUDGMENT FOR BLIND LEDGE OR LODE situated several hundred feet below the surface of the soil, and with no surface location, does not entitle plaintiff to recover hoisting-works situated on the land of another, and erected to hoist ore from the ledge or lode recovered. *Id.*

MISTAKE.

1. MISTAKE AS TO LEGAL EFFECT OF AGREEMENT by defendant will not relieve him, unless led into it by fraud or representations of complainant. *Hawralty v. Warren*, 613.
2. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT SIGNATURES TO BOND WERE MISPLACED by mistake, and that the party who signed in the place marked for witnesses really signed as surety, and that the other party, who signed in the place marked for sureties, signed as a witness only. *Richardson v. Boynton*, 141.

See JUDGMENTS, 6.

MORTGAGES

1. MORTGAGE FOR BALANCE OF PURCHASE PRICE IS VOID AND NOT ENFORCEABLE where it is executed to an assignee of the mortgagor's vendor upon a resale of the land made to the mortgagor by the assignee, who by his acts and statements induced the full belief in the mortgagor, who was not chargeable with notice of the fact, that his rights were paramount to any which the mortgagor could claim under the original contract of sale, and that he had done nothing to recognize or make himself responsible for the original contract of sale, which was untrue; and this arrangement of resale and mortgage, made under such circumstances of fraud, cannot be regarded as a compromise of conflicting claims. *Converse v. Blumrich*, 230.
2. MORTGAGE LIEN UPON HOUSE REMOVED FROM MORTGAGED LOT without the consent of the mortgagee continues upon the house as to all who have notice, but cannot attach to the lot to which it is removed. Such house will be ordered sold in case the proceeds of the mortgaged lot are insufficient; but not otherwise. *Hamlin v. Parsons*, 284.
3. MORTGAGE IS DISTINGUISHED FROM CONDITIONAL SALE by the right of redemption after the time limited for payment until barred by limitation. A conditional sale becomes absolute if the condition is not strictly performed within the time limited. *Weathersty v. Weathersty*, 344.
4. INTENTION OF PARTIES AT TIME OF CONTRACT GOVERNS in determining whether a transaction is a mortgage or a conditional sale. If then intended as a mortgage, or security for a debt, it will remain such always, and the parties cannot agree that it shall be irredeemable. Such stipulation will not be enforced in equity, though made a part of the contract of security. *Id.*
5. IF RELATION OF DEBTOR AND CREDITOR SUBSISTS, the transaction is a mortgage, and not a conditional sale. If no debt exists, or if it is extinguished, and the grantor has the privilege of refunding to obtain a reconveyance, it is a conditional sale. *Id.*
6. BILL OF SALE GIVEN TO SECURE INDORSER, accompanied by a separate written agreement that the property shall belong to the indorser if he is com-

pelled to pay the note indorsed, is a mortgage, and not a conditional sale. A subsequent verbal change in the agreement, whereby the money is directly advanced under a promise of repayment, will not alter the nature of the transaction. *Id.*

7. THIRD MORTGAGEE'S TITLE BECOMES ABSOLUTE, AND SECOND MORTGAGE IS CUT OUT, by a purchase at a foreclosure sale under the first mortgage, and obtaining a sheriff's deed thereunder. It would be the same thing if prior to the sale under the first mortgage the third mortgagee obtained the legal title. *Gibson v. Chedie*, 503.
 8. MORTGAGOR'S AGREEMENT TO PAY COUNSEL FEE IF SUIT IS BROUGHT WILL BE ENFORCED, if reasonable, by a court of equity; and that will be deemed reasonable for which the parties themselves have contracted, if it is not so extravagant as to show that it was intended as a penalty to be held in *terrorem* over the mortgagor. *Cox v. Smith*, 476.
 9. WHATEVER OTHER RIGHTS COMPLAINANT MAY HAVE CANNOT BE ENFORCED in suit brought for the sole purpose of foreclosing a mortgage if the mortgage fails; and if the complainant retains a vendor's lien, he must bring a separate suit to enforce it. *Converse v. Blumrich*, 230.
- See EQUITTY, 6; FIXTURES, 2; HUSBAND AND WIFE, 4; INSURANCE, 3; TRUSTS, 1.

NEGLIGENCE

1. NEGLIGENCE OF RAILROAD COMPANY IS GENERALLY MIXED QUESTION OF LAW AND FACT. *Baltimore etc. R. R. Co. v. Breinig*, 49.
2. QUESTION OF NEGLIGENCE IS ONE FOR JURY TO DECIDE; but as negligence consists in the failure or omission to perform some duty which the law imposes, it is within the province of the court to declare what that duty requires, or to lay down the rules of law applicable to the particular case, so that the jury may have some certain guide in forming their verdict. *Id.*
3. STANDARD OR DEGREE OF DILIGENCE IMPOSED BY LAW IN PARTICULAR CASES cannot be fixed by any general definition, on account of the varied and complicated character of cases, and the ambiguity and imperfection of our language. And any attempt to do so generally produces difficulty and confusion, instead of tending to establish plain and intelligible rules which will aid the jury in their investigations, and restrain them within just and proper limits. *Id.*
4. AMOUNT OR DEGREE OF CARE IMPOSED BY LAW UPON RAILROAD COMPANIES in the prosecution of their business must vary according to circumstances, and should be commensurate with the risk or danger of inflicting injury upon others. *Id.*
5. WANT OF CAUTION WHICH CONSTITUTES NEGLIGENCE MUST, IN ANY GIVEN CASE, DEPEND upon circumstances under which the plaintiff is placed at the time. *Beisiegel v. N. Y. Central R. R. Co.*, 741.
6. PLAINTIFF, INJURED WHILE ATTEMPTING TO PASS OVER RAILROAD TRACK AT CROSSING, CANNOT RECOVER where he was himself negligent. Cases involving this principle summarized. *Id.*
7. RAILROAD COMPANY IS BOUND TO EXERCISE MORE CAUTION AND HIGHER DEGREE OF CARE when running their cars through a village or city than in the open country. *Id.*
8. RAILROAD COMPANY, THOUGH NEGLIGENT, IS NOT LIABLE TO ONE INJURED BY IT IF HE WAS ALSO NEGLIGENT. Where one, not a passenger, but a stranger to a railroad company, was injured while crossing its track

through the thoroughfares of a city, but might have escaped such injury by the exercise of diligence such as was to be reasonably expected from the age and intelligence of such person, the company will not be liable in damages for such injury, although it may be chargeable with negligence. *Baltimore and Ohio R. R. Co. v. Breinig*, 49.

9. PERSON WHO ON PUBLIC HIGHWAY APPROACHES RAILWAY TRACK, and can neither see nor hear any indication of a moving train, is not chargeable in law with negligence for assuming that there is no car sufficiently near to make the crossing dangerous. *Ernst v. Hudson R. R. Co.*, 761.
10. IF STATUTORY WARNING OF APPROACHING TRAIN BE NOT GIVEN, a traveler upon the public highway has a right to assume that the crossing is safe, and is not bound under the circumstances to be on the alert for danger. If, however, he have actual notice of the approaching train in any other manner, he is not excused from the exercise of all due care to avoid the train. *Id.*
11. ACT OF TRAVELER ON HIGHWAY IN ATTEMPTING TO CROSS RAILROAD TRACK without looking up and down for approaching trains is divested of its character of concurrent negligence in law by the fact that the engineer of the train omitted to give the statutory signal or any other warning. *Id.*
12. QUESTION OF NEGLIGENCE SHOULD BE SUBMITTED TO JURY where traveler, in attempting to cross a railroad track in a city, walked up to it, listened and looked, so far as the obstructed condition of the track would permit, to see if a train was approaching, but was run over by an engine going, contrary to law, at an unusual rate of speed, and without giving any warning of its approach. *Id.*
13. ORDINARY CARE REQUIRES WAY-TRAVELER TO LOOK WHEN APPROACHING RAILROAD TRACK; but if he cannot see by reason of obstructions thereon, it requires him to stop just short of the track and listen. *Id.*
14. OMISSION OF CUSTOMARY SIGNALS IS ASSURANCE BY RAILROAD COMPANY that no train is approaching crossing. *Id.*
15. TRAVELER ON PUBLIC HIGHWAY AT RAILROAD CROSSING MAY RIGHTFULLY ASSUME that no train is approaching, where he sees none, and no flag is displayed, and no bell or whistle is sounded. *Id.*
16. TRAVELER IN STREET OF CITY AT RAILROAD CROSSING, WHO SEES NO TRAIN APPROACHING, is not bound to be on alert for danger when the railroad company has assured him, by its omission to give the customary signals, that the crossing is safe. *Id.*
17. NONSUIT. — IT IS ERROR TO HOLD AS MATTER OF LAW THAT PLAINTIFF WAS GUILTY OF NEGLIGENCE in not continuing to look both ways simultaneously, where he, in attempting to cross a railroad track in the street of a populous city, walked up to it, listened and looked, first one way and then the other, so far as the obstructed condition of the track would permit, but was run over, before he could clear the track, by an engine going, contrary to law, at a dangerous rate of speed, and without giving the customary signals of danger; and it is error to nonsuit him on that ground. *Id.*
18. EVIDENCE OF SIMILAR ACTS OF NEGLIGENCE PRIOR TO THAT COMPLAINED OF on the part of other employees of a railroad company upon other trains is not admissible in an action against the company for neglect of duty by its employees. *Southern R. R. Co. v. Kendrick*, 332.
19. AGREEMENT IN CONSIDERATION OF FREE TICKET TO RELEASE RAILROAD COMPANY FROM ALL LIABILITY FOR NEGLIGENCE of its servants is

valid; and the company will not be liable to the holder of such free ticket for an injury which occurred through such cause. *Kinney v. Central R. R. Co.*, 675.

20. GENERAL CHARACTER OF EMPLOYEE for faithfulness cannot shield the employer from liability if the evidence shows negligence and wrong committed by the employee. *Southern R. R. Co. v. Kendrick*, 332.

See AGENCY, 2; BANKS AND BANKING, 3; COMMON CARRIERS; HIGHWAYS, 3; MASTER AND SERVANT; RAILROADS.

NEGOTIABLE INSTRUMENTS.

1. MATERIAL ALTERATION OF NOTE BY PAYEE unauthorized in any way by the maker, but made without any fraudulent intent, and under mistake, avoids the note, but leaves the debt unpaid, and the payee may recover it. *Lewis v. Schenck and Smith*, 631.
2. MATERIAL ALTERATION OF NOTE BY PAYEE, without fraudulent intent and under mistake, avoids the note, but leaves the debt unpaid, and the proper remedy to recover it is at law; but where the discovery prayed by the bill is in some degree necessary to show the agreement and the mistake, equity will entertain jurisdiction. *Id.*
3. NOTE IS VALID AS FOUNDED ON SUFFICIENT CONSIDERATION where, for a loan of fifteen hundred dollars in gold coin, made at a time when that amount of gold would be worth two thousand five hundred dollars in paper currency, the note was executed for two thousand five hundred dollars, without specifying in what kind of money it was payable. *Cog v. Smith*, 476.
4. INDORSEMENT AND DELIVERY OF NEGOTIABLE PAPER AS COLLATERAL SECURITY before maturity passes the legal title to the holder, with power to collect by suit or otherwise, subject to the rights of the indorser as to the application of proceeds. The responsibilities of the holder of collateral security are implied by law. *Lamberton v. Windom*, 301.
5. EVIDENCE AS TO ORIGINAL SOLVENCY of the maker of a collateral note is admissible when loss of such note through his insolvency by neglect of the holder is pleaded as a defense to an action upon the note secured. *Id.*
6. PERSON IS TO BE DEEMED BONA FIDE HOLDER OF COMMERCIAL PAPER where he purchased it for full value before maturity without notice of any equities between the original parties, or of any defect of title. *Megee v. Badger and Potter*, 691.
7. PURCHASER OF COMMERCIAL PAPER FOR FULL VALUE BEFORE MATURITY IS NOT BOUND at his peril to be upon the alert for circumstances which might possibly excite the suspicions of wary vigilance. He does not owe to the party who puts negotiable paper afloat the duty of active inquiry to avert the imputation of bad faith. *Id.*
8. RIGHTS OF HOLDER WHO HAS PURCHASED COMMERCIAL PAPER FOR FULL VALUE BEFORE MATURITY ARE TO BE DETERMINED by the simple test of honesty and good faith, and not by a speculative issue as to diligence or negligence. *Id.*
9. PLAINTIFF MAY PROVE THAT NOTE SUED ON was in the possession of defendant at the time of the trial, without alleging that fact in his complaint. *McClusky v. Gerhauser*, 512.
10. OWNER'S RIGHT OF ACTION ON NOTE is as perfect if it is in the possession of defendant as if it were in his own possession, and the fact of possession need not be alleged in the complaint. *Id.*

11. WHERE NOTE SURED ON IS IN POSSESSION OF PLAINTIFF, he must produce it, as it is the best evidence; but if it is in defendant's possession, and he fails to produce it, the plaintiff may prove its execution and contents by secondary evidence. *Id.*
12. OWNER CANNOT MAINTAIN ACTION AT LAW upon a bill or note payable to bearer, or properly indorsed, but lost before maturity; he is compelled to apply to equity, stating the loss as ground for relief; for as a *bona fide* holder of such note taken in the ordinary course of business would have a right of recovery on it, the owner could not establish his right of recovery at law. *Id.*
13. WHEN NOTE SURED ON IS IN POSSESSION OF DEFENDANT, plaintiff's remedy is complete at law. *Id.*
14. IN ACTION ON NOTE WHICH IS IN POSSESSION of defendant, who is notified to produce it, and fails or refuses to do so, secondary evidence of its execution may be introduced. *Id.*
15. COMPLAINT IN ACTION ON PROMISSORY NOTES, which sets them out in full, and shows the execution, delivery, maturity, and ownership of them, and that there is a certain sum "due, owing, and payable" thereon, is sufficient without a direct allegation of non-payment. *Howard v. Richards*, 520.
16. WHERE PROMISSORY NOTE IS EXPRESSLY AND UPON ITS FACE MADE PAYABLE at a certain bank, a demand at that bank is sufficient, and no parol evidence of any custom at the bank giving the note a different construction is admissible to alter the contract. *People's Bank of Baltimore v. Keech*, 118.
17. NOTICE OF DISHONOR OF PROMISSORY NOTE, SENT TO ONE OF TWO PAYEES and indorsers, though in the name of and for both of them, where they reside in different towns, is not notice to the one to whom no notice was actually sent. *Id.*
18. NOTICE OF DISHONOR OF PROMISSORY NOTE, SENT TO ONE OF TWO JOINT PAYEES and indorsers, though in the name of and for both of them, will not bind the one not served; and since he will be discharged, the other, as a necessary legal consequence, is also discharged, for where the engagement of several persons is as joint debtors, the discharge of one by the act or default of the creditor discharges all. *Id.*
19. JOINT MAKERS OF PROMISSORY NOTE BARRED BY STATUTE OF LIMITATIONS WILL NOT BE DEPRIVED OF THEIR DEFENSE of the bar of the statute by an allowance in a probate court of a demand against the estate of a deceased joint maker, and payments made thereon by the administrator of such deceased maker. *Smith v. Irwin*, 375.
20. WHERE TWO PERSONS GIVE THEIR NOTE FOR LAND JOINTLY CONVEYED TO THEM, and afterwards one of them conveys his interest to the other, who, the payee assenting to the arrangement, assumes the payment of the whole note, the payee can, in an action for money had and received, recover the whole amount of the note against the party who has thus assumed its payment. *Woodbury v. Woodbury*, 555.
21. WHERE NAME OF PAYEE OF NOTE IS INDORSED THEREON IN HIS PRESENCE, at his request, and by his direction, by another person, the indorsement is as valid as if written by such payee's own hand. *Id.*
22. INDORSER OF PROMISSORY NOTE BEFORE DELIVERY TO PAYEE IS PRIMA FACIE GUARANTOR; although a mere indorsement in blank is not sufficient to establish the liability of such guarantor under the Nevada statute requiring a guaranty to express the consideration. *Van Doren v. Tjader*, 498.

23. GUARANTOR OF PROMISSORY NOTE WILL NOT BE DISCHARGED BY HOLDER'S FAILURE to demand payment and give notice of non-payment, it seems, as in case of an indorser; but a reasonable notice of demand and non-payment only is required, and even that is excused where the maker is insolvent at the time the note becomes due. *Id.*
 24. GUARANTY MUST BE IN WRITING, AND MUST EXPRESS CONSIDERATION, under the Nevada statute, although it be made at the time of the principal contract, and upon the same consideration. A mere indorsement in blank of a promissory note before delivery to the payee is therefore not sufficient as a guaranty. *Id.*
 25. RIGHTS OF HOLDER OF BILL OF EXCHANGE DRAWN IN ONE STATE, and payable in another, are governed by the laws of the latter. *Coffman v. Bank of Kentucky*, 311.
 26. FAILURE TO PRODUCE BILL OF EXCHANGE AT TIME OF PAYMENT BY DRAWER to original holder is sufficient to put the drawer on inquiry, and to lead him to notice of the transfer of the bill, and such payment, though made after maturity, is no defense against the holder. *Id.*
 27. OBJECT OF NOTICE OF PROTEST OF BILL OF EXCHANGE IS TO GIVE NOTICE to the parties to the bill of its dishonor, and is sufficient if signed by the notary. *Id.*
 28. NOTICE OF PROTEST OF BILL OF EXCHANGE indorsed by a bank may be addressed to its cashier. *Id.*
 29. NO SPECIFIC DEMAND IS REQUIRED ON NOTE PAYABLE ABSOLUTELY IN MONEY ON DEMAND. The commencement of a suit is a sufficient demand. *Weil v. Tyler*, 441.
 30. SPECIFIC DEMAND MUST BE MADE ON NOTE PAYABLE IN SPECIFIC ARTICLES OF PERSONAL PROPERTY, where no day or place of payment is mentioned, or fixed by some clear and certain implication of law. *Id.*
 31. ACCEPTOR OF FORGED BILL IS BOUND TO KNOW DRAWER'S HANDWRITING, and if he accepts the bill and pays it to a holder *bona fide* and for a valuable consideration, he cannot recover back the money. *Stout v. Benoit*, 466.
- See BANKS AND BANKING, 3; EXECUTORS AND ADMINISTRATORS, 3; INTEREST, 3; PLEDGES; STATUTE OF LIMITATIONS, 1.

NEWSPAPERS.

See EVIDENCE, 2.

NOTARIES.

See BANKS AND BANKING, 2, 3.

NOTICE.

1. PERSON IS CHARGEABLE WITH CONSTRUCTIVE NOTICE, where, having the means of knowledge, he does not use them. If he has knowledge of such facts as would lead any honest man using ordinary caution to make further inquiries, and does not make, but on the contrary studiously avoids making, such obvious inquiries, he must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would readily have ascertained. *Converse v. Blumrich*, 230.
2. PERSON PUT UPON INQUIRY CANNOT BE BOUND TO DO MORE than apply to the party in interest for information, and will not be responsible for not pushing his inquiries further, unless the answer which he receives cor-

roborates the prior statements, or reveals the existence of other sources of information. *Id.*

2. LAW OF CONSTRUCTIVE NOTICE CAN NEVER BE SO APPLIED as to relieve a party from responsibility for actual misstatements and frauds. *Id.*

See ATTACHMENTS, 7.

NUISANCE.

1. EVIDENCE. — IN ACTION AGAINST PROPRIETORS OF LARGE ROLLING-MILLS AND MACHINERY FOR DAMAGES TO PLAINTIFF'S HOTEL by covering the same with smoke and cinders, and jarring and shaking the building, rendering living or sleeping therein almost impossible, it would be competent to prove by direct evidence that lodgers in the hotel were induced to leave by reason of these acts of defendants; but the declarations of guests who were coming down from their rooms on their way to another hotel, that they were leaving on account of the noise, shaking, and smoke, is incompetent for that purpose. *Wesson v. Washburn Iron Co.*, 181.
2. EVIDENCE. — TESTIMONY OF EXPERTS IN REAL ESTATE VALUES that the stoppage of defendant's works would materially diminish the value of plaintiff's property, in an action against the owners of a large mill for maintaining a nuisance by operating their works, is inadmissible, although plaintiff has introduced evidence to the effect that the operation of their works has reduced the rental value of her property. *Id.*
3. PRIVATE ACTION FOR NUISANCE GENERAL IN ITS OPERATION. — Action will lie against owners of a mill for injuring plaintiff's dwelling by shaking and jarring the same, and surrounding it with noisome odors and vapors, although all the other residents of that locality have suffered like injury. The rule that where the right invaded or impaired is a common and public one, which every subject of the state may use and enjoy, an individual action does not lie, does not apply to cases where the alleged wrong is done to private property, or the health of individuals is injured or their comfort destroyed by the carrying on of offensive trades or the creation of noisome smells or disturbing noises, no matter how extensive or numerous may be the instances of discomfort or injury to persons or property thereby occasioned. *Id.*

OFFICE AND OFFICERS.

1. LAW PRESUMES THAT OFFICE IS CREATED FOR BENEFIT OF PUBLIC. *Robinson v. Chamberlain*, 713.
2. EVERY PUBLIC OFFICER WHOSE DUTIES ARE NOT JUDICIAL IS LIABLE TO INDIVIDUAL who sustains special damage from the negligent performance of such officer's duties, or his omission to perform them. *Id.*
3. CONTRACTOR INVESTED WITH POWERS OF NON-JUDICIAL OFFICER IS LIABLE TO ONE who sustains special damage by such contractor's neglect of duty. *Id.*
4. OFFICERS ARE OFFICERS DE FACTO, AND THEIR ACTS AS TO THIRD PERSONS ARE VALID, where, although their appointment by the selectmen of a county was without authority, they were commissioned by the governor of the territory, who was authorized to issue commissions to such officers, and they discharged the duties of their offices, and were generally recognized as legally constituted officers. *Mallett v. Uncle Sam Gold and Silver Mining Co.*, 484.

5. COUNTY TAX COLLECTOR IS CITY OFFICER *pro hac vice* when collector of city taxes. *City of St. Paul v. Colter*, 278.

PARTNERSHIP.

See CORPORATIONS, 3; POSSESSION.

PART OWNER.

See AGENCY, 1.

PAYMENT.

See AGENCY, 7.

PERPETUITIES.

See ESTATES; POWERS; TRUSTS, 4-7.

PLEADING AND PRACTICE.

1. PARTY NEED NOT PLEAD FACT WHICH when established has no effect whatever except to admit secondary evidence to sustain his right of action or ground of defense. *McClusky v. Gerhauer*, 512.
2. COMMENCEMENT OF NARR. IS MERELY RECITAL OF WRIT, and not a necessary part of a declaration, under article 75 of the Maryland code, which declares that it shall not be necessary to state any formal commencement or conclusion to any declaration or other plea. *Wilms v. Watts*, 113.
3. NO GENERAL DEMURRER IS ALLOWED FOR MERELY INFORMAL STATEMENT OF CAUSE OF ACTION OR DEFENSE, "provided such statement is sufficient in substance." *Id.*
4. VARIANCE BETWEEN WRIT AND DECLARATION WOULD BE CURED BY VERDICT under the old forms of pleading. *Id.*
5. DEFENDANT MUST PLEAD IN ABATEMENT, IF HE WISHES TO AVAIL HIMSELF of the plaintiff's incapacity to sue, in a court of general jurisdiction. *Id.*
6. ERRORS RELATING TO FORM OF PROCESS, AND NOT TO CAUSE OF ACTION, and which are in the nature of dilatory pleas, are not favored in law. *Id.*
7. DENIAL OF MOTION PRECLUDES the party from subsequently maintaining a like motion on the same grounds. *Bennett's Adm'r v. Russell's Ex'rs*, 457.
8. IN DETERMINING PROPRIETY OF NONSUIT, COURT WILL ASSUME truth of facts which plaintiff's testimony legitimately conduced to prove, though their correctness be controverted by defendant's witnesses. *Ernst v. Hudson R. R. Co.*, 761.
9. DISTINCT EXPRESSION OF OPINION BY COURT IS NOT OBITER DICTUM, where given in response to a question of equitable jurisdiction, directly involved in the issues of law, and raised by demurrer to the bill, and to which the mind of the court was directly drawn. *Michael v. Morrey*, 106.
10. INSTRUCTIONS SHOULD NOT BE SO FRAMED, NOR GIVEN AND REFUSED, as to exclude from the jury the consideration of the points which are fairly raised by the evidence. *Sawyer v. Hannibal etc. R. R. Co.*, 382.
11. IT IS NOT ERROR TO REFUSE TO GIVE NUMEROUS PROPOSITIONS IN GROSS AS CHARGE TO JURY where some of them are plainly erroneous; and under an exception to such refusal, the question as to whether the remaining propositions were correct is one which the appellate court will not consider. *Mages v. Badger and Potter*, 691.

12. INSTRUCTION SHOULD NOT STATE TESTIMONY OF PARTICULAR WITNESS, as what that testimony was is a matter to be determined by the jury. *South-ern R. R. Co. v. Kendrick*, 332.
 13. AMBIGUOUS INSTRUCTIONS which may mislead the jury ought not to be given. *Id.*
 14. CONFLICTING INSTRUCTIONS to the jury are irregular, and should not be given. *Id.*
 15. IF THERE IS NO EVIDENCE TO SUPPORT ISSUE, IT IS COURT'S DUTY TO SO INSTRUCT JURY. *Alexander v. Harrison*, 431.
 16. INSTRUCTION IS OBJECTIONABLE IF IT LIMITS ISSUE TO PARTICULAR FACTS. *Id.*
 17. SUPREME COURT WILL REVERSE JUDGMENT WHERE THERE WAS NO EVIDENCE TO SUPPORT VERDICT. *Id.*
 18. INTRODUCTION OF IMMATERIAL TESTIMONY IS NOT GROUND FOR SETTING ASIDE VERDICT. *Adams v. Blodgett*, 569.
 19. JUDGMENT WILL NOT BE SET ASIDE, NOR NEW TRIAL GRANTED, on the ground of surprise, when from the applicant's own showing it appears that if he had not been taken by surprise, the result would not have been different, or that the result of a second trial will be different. *McOmally v. Gerhauser*, 512.
 20. JUDGMENT WILL NOT BE REVERSED for want of findings of fact not excepted to in the trial court. *Id.*
 21. NEW TRIAL WILL NOT BE GRANTED on ground of newly discovered evidence when such evidence will not change the result. *Id.*
 22. WHERE CAUSE IS SUBMITTED TO COURT WITHOUT AID OF JURY, NO APPEAL LIES, or will be entertained for the purpose of having the appellate court examine the facts in evidence with a view to adjudge whether the finding of the court below as to them was correct. *Tinges v. Moale*, 73.
 23. ON APPEAL FROM CAUSE SUBMITTED TO COURT WITHOUT AID OF JURY, facts as found by court below may be considered to the same extent that they could be if they had been found by the jury, but no further. *Id.*
 24. IF QUESTION OF LAW IS RAISED ON APPEAL FROM CAUSE SUBMITTED TO COURT WITHOUT AID OF JURY, and that appears from the record, it must be examined and decided, but in doing so the appellate court can look to the character of the facts only so far as may be necessary or proper to understand and apply the law in question. *Id.*
 25. ON APPEAL FROM JUDGMENT IN CASE SUBMITTED TO COURT UPON LAW AND FACT, WITHOUT AID OF JURY, the court of appeals will review the decision upon questions of law, if the record plainly discloses the points or questions raised and decided by the court below. *Id.*
 26. OPINION OF COURT IS NO PART OF RECORD, and without some bill of exceptions, or other aid, it is not a subject-matter for review. *Id.*
- See ATTACHMENT; COSTS; EJECTMENT; EVIDENCE; NEGOTIABLE INSTRUMENTS; REFEREES; REPLEVIN; SET-OFF; SLANDER; STATUTE OF LIMITATIONS, 3; TRESPASS.

PLEDGE.

1. VALID PUBLIC SALE OF STOCK.—Where a pledgee, at the public stock board, sells stock which he has taken and held as collateral security for loans made to the pledgor, the transaction constitutes a valid public sale, where no fraud appears in it. *Bryson v. Rayner*, 69.
2. IN ABSENCE OF SPECIAL AUTHORITY, IT IS DUTY OF PLEDGEE OF HYPOTHECATED STOCK TO DISPOSE OF IT AT PUBLIC SALE, after a reasonable

- notice to the public of the time and place of sale, or at the public stock board; but special authority will enable the pledgee to sell at private sale and without notice. *Id.*
2. IN PLEDGEE OF HYPOTHECATED STOCK SELLS IT AT PUBLIC STOCK BOARD, UPON PLEDGOR'S FAILURE TO REDEEM, and himself becomes the purchaser thereof, and continues to hold such stock, he will be regarded as still maintaining the character of bailee, and as holding the pledge to secure the payment of the loan with interest, and will be required to account for all dividends on the stock received by him in the mean time. *Id.*
 4. IF PLEDGOR OF HYPOTHECATED STOCK GIVES PLEDGEE WRITTEN AUTHORITY TO SELL SUCH PLEDGE in case it is not redeemed at a day specified, or to give the same "to any broker to sell on that day," and the pledge is not redeemed on the day specified, a sale made by a broker thereafter at private sale, for the full market price of the stock at that date, is in conformity with the authority, and valid. *Id.*
 5. WHERE ARTICLE PLEDGED IS SPECIFIC CHATTEL, THERE IS AMPLE REMEDY AT LAW BY REPLEVIN if the pledgee retains the possession, or by trover or *assumpsit* in case he has parted from it. *Id.*
 6. EQUITY ALONE CAN AFFORD RELIEF, BY ORDERING RETRANSFER OF PLEDGED STOCK OF INCORPORATED COMPANY, where the shares have been transferred upon the books of the corporation, and stand in the name of the pledgee as legal owner. The law falls short of the remedy to which the pledgor is entitled. *Id.*
 7. ANALOGY BETWEEN PLEDGE OF STOCK GIVEN AS COLLATERAL SECURITY AND MORTGAGE. — Although a pledge is not technically a mortgage, the subject of it not having been assigned or transferred by an instrument known to the law as such, with a condition of defeasance, yet, where it is given as a security for debt, it partakes of the nature of a mortgage, and is subject to some of its incidents, including the right of redemption, and no good reason exists why equity should withhold its aid from the pledgor seeking a return of the pledge in a case where the law cannot restore it. *Id.*
 8. PLEDGOR, ON PAYMENT OF DEBT OR TENDER, IS ENTITLED TO RETURN OF IDENTICAL PROPERTY PLEDGED, and equity may be invoked for this purpose where the law fails. *Id.*
 9. IF PAWNEE HAS TWO REMEDIES, TO SELL AT LAW AFTER DEFAULT AND NOTICE, OR TO FORECLOSE IN EQUITY, no reason exists why a pledgor should not be furnished with the equitable remedy to redeem. *Id.*
 10. PLEDGEE OF NEGOTIABLE PAPER AS COLLATERAL SECURITY IS BOUND TO ORDINARY DILIGENCE to preserve the legal validity and pecuniary value of the pledge, and must take active measures to prevent a loss by insolvency of parties liable upon the collateral note. He is liable to the extent of such loss occasioned through his negligence. *Lamberton v. Windom*, 301.

POSSESSION.

POSSESSION OF ONE PARTNER OR TENANT IN COMMON INJURES TO BENEFIT OF ALL until such possession becomes adverse. *Mallett v. Uncle Sam Gold and Silver Mining Co.*, 484.

POWERS

1. EVERY POWER, DIRECT OBJECT OF WHICH IS TO CREATE PERPETUITY, is generally held to be absolutely void; the exceptions to the rule arise out

of the distinction between general and limited or special powers. *Barnum v. Barnum*, 88.

2. **EXECUTION OF POWER, BEING DISTINCT FROM POWER ITSELF**, must conform to the requirements of the rule against perpetuities, or run the hazard of being avoided. *Id.*
3. **WHERE POWER DOES NOT IN ITSELF TRANSGRESS RULE AGAINST PERPETUITIES**, the appointee may, in executing it, go beyond the boundary provided by such rule; and equity in such case being guided by the power, will treat the excess as surplusage and void, but only where the excess be definite and ascertained, or can be rendered so. If, however, the limitation is in the instrument itself which creates the trust or power, and no one can declare with certainty how the dispositions of the testator would have been regulated if he had been aware at the time of his inability to extend them to some included in his gifts, the whole will be vitiated by the excess. *Id.*

PROBATE COURTS.

See JUDGMENTS, 5; WILLS.

QUESTIONS OF LAW AND FACT.

1. **WHERE TESTIMONY IS CONFLICTING, AND FACTS ARE UNSETTLED**, the jury are to decide, under the instructions of the court, as to the law. *Roth v. Buffalo & S. L. R. Co.*, 736.
2. **WHERE THERE IS NO DISPUTE AS TO FACTS**, the question is purely one of law, and the court should decide it. *Id.*

See TIME.

RAILROADS.

1. **RAILROAD COMPANY IS LIABLE FOR ACT OF ONE OF ITS CONDUCTORS** in improperly putting a person off a freight-car while the train is in motion, if it has instructed its conductors not to allow any person to ride in any freight-car attached to its train. *Holmes v. Wakefield*, 171.
2. **NO RELATION OF CONTRACT, TRUST, OR CONFIDENCE EXISTS BETWEEN RAILROAD COMPANY AND STRANGER**; each party being in the lawful pursuit of his own business, or the lawful exercise of his own rights, is required only to exercise such reasonable care to avoid injuring the other as ordinary prudence suggests. *Baltimore etc. R. R. Co. v. Breinig*, 49.

See COMMON CARRIERS; NEGLIGENCE.

REALTY.

See FIXTURES; VENDOR AND VENDEE.

RECEIVERS.

See EQUITY, 4; JUDGMENTS, 1.

REFEREES.

REFEREE'S FINDING ON QUESTION OF FACT MAY BE REVIEWED in the supreme court of New York, but it is conclusive in the court of appeals. *Stockwell v. Phelps*, 710.

REGISTRATION.

See DEEDS.

REPLEVIN.

REPLEVIN IN OBIT CAN ONLY BE BROUGHT WHEN TRESPASS COULD BE MAINTAINED, and that will lie for an injury to land only when the plaintiff is in possession. *Stockwell v. Phelps*, 710.

RESCISSION.

See CONTRACTS, 2.

RESTRAINT OF TRADE,

See CONSTITUTIONAL LAW, 13; CONTRACTS, 1.

RETROACTIVE LAWS.

See CONSTITUTIONAL LAW; STATUTES.

RIPARIAN RIGHTS.

1. AT COMMON LAW, EACH RIPARIAN PROPRIETOR HAS EQUAL RIGHT to the use of the water which flows in the stream adjacent to his land as it was wont to run, without diminution or alteration. No proprietor has a right to use the water to the prejudice of another above or below without a prior right to divert it, or unless it is necessary for domestic uses and watering stock. *Loddell v. Simpson*, 537.
2. AS BETWEEN OCCUPANTS OF PUBLIC LANDS CLAIMING WATER by appropriation, he has the best right who is first in time; in other words, the prior appropriator is entitled to it to the extent appropriated to the exclusion of any subsequent appropriator for the same or any other use. *Id.*
3. OCCUPANT OF PUBLIC LAND CLAIMING WATER by prior appropriation is not entitled to any greater quantity of water than he actually appropriated prior to a subsequent appropriation. *Id.*
4. PRIOR APPROPRIATOR OF WATER OF STREAM has an absolute right to the quantity of water appropriated as against a subsequent appropriator of the water of the same stream, and he has a right to remove any obstructions from the natural channel, but he has no right to make any change therein that will injure the subsequent appropriator. *Id.*
5. PRIOR LOCATOR UPON AND APPROPRIATOR of the water of a stream, as against a subsequent locator and appropriator of the water of the same stream, has no right to either raise or lower any dams, or to close up any ditches which may have existed at the time of his own and the location of others, if others are injured thereby. *Id.*
6. SUBSEQUENT LOCATOR UPON STREAM, AND APPROPRIATOR of the water thereof, has a right to have it flow precisely as it did when he located. *Id.*
7. RIPARIAN RIGHTS. — Any user of a stream by an upper proprietor which substantially diminishes its volume, or defiles or corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, is improper, and will be enjoined. *Merrifield v. Lombard*, 172.
8. UPPER PROPRIETOR WILL BE ENJOINED FROM CONDUCTING POISONOUS OR CORROSIVE SUBSTANCES INTO STREAM, causing injury or damage to a lower proprietor's machinery. *Id.*

SALES.

1. ON BREACH OF SPECIAL WARRANTY, PLAINTIFF IS ENTITLED TO SUCH DAMAGES as were the natural and necessary consequences of the breach. *Passinger v. Thoburn*, 753.
 2. MEASURE OF DAMAGES WHEN THING SOLD WITH WARRANTY DOES NOT ANSWER WARRANTY is the difference between the actual value and the value that the article would have possessed if it had conformed to the warranty. *Id.*
 3. WHERE DEFENDANT SOLD CABBAGE-SEED, AND WARRANTED THEM TO PRODUCE BRISTOL CABBAGES, which warranty was false, it was held that the damages would be the value of a crop of Bristol cabbages such as ordinarily would have been produced that year, deducting the expense of raising the crop, and also the value of the crop actually raised therefrom. *Id.*
 4. WHERE ARTICLE IS SOLD WITH WARRANTY, AND VENDEE RESILLS WITH LIKE WARRANTY, the sum paid by him in an action by his sub-vendee for a breach of that warranty is *prima facie* evidence of the amount which he will be entitled to recover from his vendor in an action in his own behalf. *Id.*
- See AGENCY, 3-7; ATTACHMENT, 6-9; AUCTIONS; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; PLEDGE; INSURANCE; MORTGAGES, 3-6.

SET-OFF.

1. DEFENDANT MAY SET OFF NOTE OF PLAINTIFF WITHOUT SURRENDERING COLLATERAL SECURITIES, since his right to sue on the note is an absolute one, not in any way affected by his possession of the securities, and a court of law has no power to enforce such equities in the securities as may result to the plaintiff from the allowance of the set-off. *Wallace v. Finnegan*, 243.
2. PERSON HOLDING COLLATERAL SECURITIES IS NOT BOUND TO RESORT TO THEM before suing upon his principal claim, but when that claim is satisfied, he may be compelled to release or reassign the collaterals. *Id.*
3. NOTHING CAN BE SET OFF UNLESS IT CAN BE SUED UPON; and any claim coming within the statute can be set off if it can be sued. *Id.*
4. IF AFTER ALLOWING SET-OFF OF NOTE SECURED BY COLLATERALS defendant is still found in debt to plaintiff, the latter has other remedies to recover the collaterals if the defendant should see fit to withhold them; but if the set-off brings the plaintiff in debt, the defendant may properly hold them for the balance. *Id.*
5. WHERE, AFTER DEFENDANT HAS BEEN DEFAULTED, SUBSEQUENT ATTACHING CREDITOR IS ALLOWED TO DEFEND, he may be allowed a claim of the defendant against the plaintiff in offset to the plaintiff's claim, where there is no other claim on which either the plaintiff or defendant can desire to make application of such offset. *Woodbury v. Woodbury*, 555.

SHERIFFS.

See EXECUTIONS.

SHIPPING.

OWNER OF VESSEL IS NOT LIABLE FOR DEMURRAGE if the bill of lading contains no provision for the payment thereof; and certainly not if he

assigns the bill of lading before any of the cargo has been delivered.
Gage v. Morse, 155.

See INSURANCE, 3.

SLANDER.

1. WHERE DECLARATION IN SLANDER COMMENCED, "J. W., by her next friend, H. A., by her attorney, J. D. B., sues F. C. B. W. for: 1. The said J. W. is of the age of twenty-one years and a *feme sole*," etc., and then charged the slanderous words, it was held that the words "by her next friend," in the commencement of the *narr.*, being followed by other words, "by J. D. B., her attorney," were obviously misrecital and mere surplusage, *utile per inutile non vitiatur*, the previous entries of the record showing that she acted by attorney. *Wilms v. White*, 113.
2. IN ACTION FOR SLANDER, JURY ARE NOT RESTRICTED TO NOMINAL DAMAGES, although the slanderous words, which charged theft, were spoken in the presence of only a single witness, who testifies that they did not affect his opinion of the plaintiff, and that he still believed the plaintiff to be honest, if the words are shown to have been spoken maliciously. *Markham v. Russell*, 160.
3. IN SLANDER, EVIDENCE OF SIMILAR SLANDEROUS WORDS spoken on other previous occasions is admissible to show that the words which are the basis of the action were spoken with malice and ill-will, and thereby to aggravate the damages. *Id.*
4. EXEMPLARY DAMAGES ARE PROPERLY ALLOWED IN ACTIONS FOR DEFAMATION of character of chaste *feme sole*. *Wilms v. White*, 113.
5. IN ABSENCE OF STATUTORY RULE OF DAMAGES IN ACTION FOR SLANDER, where exemplary damages are sought to be recovered, the fact of the wealth of defendant is admissible in evidence and pertinent to the issue, to show his rank and influence in society as the result thereof, and the consequent increased damages from his high standing. *Id.*

STATUTE OF FRAUDS.

1. STATUTE OF FRAUDS—DELIVERY AND ACCEPTANCE.—Where a person in Massachusetts sells some hides in a New York warehouse, and gives a bill of the goods and an order on the warehouseman to the buyer, without notifying the warehouseman, this is not such a delivery to and acceptance by the buyer as satisfies the statute of frauds. *Boardman v. Spooner*, 196.
2. MEMORANDUM IN WRITING SIGNED BY PARTY TO BE CHARGED IS NOT ESTABLISHED by showing that the seller gave to the buyer a bill of items of the property, together with an order for the delivery of the goods where they were stored, and that the buyer stamped with a machine his name and the date thereon, without evidence showing when or for what purpose it was done. *Id.*
3. STATUTE OF FRAUDS—ENTRY IN BOOK TO TAKE CASE OUT OF.—Where goods are sold, the sale to be subject to the buyer's approval of the goods, an entry in the broker's books reciting the sale, but omitting to state that the sale was to be subject to the buyer's approval, is defective, and does not take the case out of the statute. *Id.*
4. WHERE ONE PARTY TO CONTRACT VOID BY STATUTE OF FRAUDS AVAILS HIMSELF OF ITS INVALIDITY, and unconscientiously appropriates what he has acquired under it, equity will compel restitution; and it consti-

tutes no objection to the claim that the defrauded party may happen to secure the same practical benefit through the process of restitution which would have resulted to the other party from the observance of the void agreement. *Ryan v. Dox*, 696.

5. COURTS WILL NOT PERMIT STATUTE OF FRAUDS TO BE PERVERTED INTO INSTRUMENT OF FRAUD. They will not allow the medium of fraud to be interposed to prevent an agreement from being put into writing; so where the statute plainly declares an agreement void if not reduced to writing, the defendant will not be permitted to avail himself of the statute if his fraud contributed to prevent the agreement from being put into writing. *Id.*
6. EQUITY WILL AT ALL TIMES LEND ITS AID TO DEFEAT FRAUD, notwithstanding the statute of frauds. *Id.*
7. PART PERFORMANCE OF PAROL AGREEMENT IS SUFFICIENT TO TAKE CASE OUT OF statute of frauds. *Id.*
8. POSSESSION DELIVERED IN PURSUANCE OF PAROL AGREEMENT IS SUCH DEGREE OF PERFORMANCE as to take contract out of statute of frauds. *Id.*
9. COURTS OF EQUITY WILL ENFORCE SPECIFIC PERFORMANCE OF CONTRACT within the statute of frauds, where a parol agreement has been partly carried into execution. *Id.*

STATUTE OF LIMITATIONS.

1. ANTEDATED NOTE — STATUTE OF LIMITATIONS. — Where at the time a promissory note was made it was antedated a number of years by the agreement of the parties, the statute of limitations begins to run against it from the time it comes due by its terms, and not from the time it was made. *Paul v. Smith*, 647.
2. APPLICATION OF DEFENDANT FOR LEAVE TO INTERPOSE DEFENSE OF STATUTE OF LIMITATIONS after having pleaded the general issue is addressed to the discretion of the court below, and its denial cannot be reviewed by the appellate court. *Ripley v. Davis*, 262.
3. STATUTE OF LIMITATIONS. — WHERE ACTION IS BROUGHT before the statute begins to run, a substituted plaintiff cannot amend his complaint and incorporate a new cause of action so as to bar or embarrass the defense of the statute, which might be pleaded against the new cause of action. *Bullion M. Co. v. Crassus Gold etc. M. Co.*, 626.

See ABANDONMENT, 2; NEGOTIABLE INSTRUMENTS, 19.

STATUTES.

STATUTE IS TO BE DEEMED RETROSPECTIVE OR RETROACTIVE where it takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. *Hope Mutual Ins. Co. v. Flynn*, 438.

See CONSTITUTIONAL LAW.

STOCK.

See PLEDGE; TAXATION.

SUBROGATION.

See SURETYSHIP, 3.

SURETYSHIP.

1. IN ACTION AGAINST SURETY ON BANK CASHIER'S BOND, after plaintiffs have proved that it was the custom of the directors to have an examination of the affairs of the bank once in six months, and of the cashier to lay before them twice a week a general statement of the condition of the bank, and that on a particular day the cashier presented to the directors a statement which purported to show the condition of the bank, evidence is admissible on their part of the cashier's admissions made at that time in reply to questions put to him by the directors concerning such statement, that the same was false, and that he embezzled certain sums, and forced the accounts of the bank. *Bank of Brighton v. Smith*, 144.
2. SURETIES WHO ARE SEVERALLY AND NOT JOINTLY BOUND in sum of two thousand dollars each upon an official bond taken in the penal sum of twenty thousand dollars from ten sureties may be held liable in the full sum of two thousand dollars, if an unsatisfied defalcation of the principal exceeds that sum, although such defalcation is less than twenty thousand dollars. *Id.*
3. EQUITY RECOGNIZES RIGHT OF SURETY TO PAY OFF NOTE OR OBLIGATION OF PRINCIPAL DEBTOR, and be subrogated to the rights of the creditor. *Rucker v. Robinson*, 412.
4. SURETY IS NOT DISCHARGED UNLESS CREDITOR DOES SOME ACT BY WHICH HE DEPRIVES HIMSELF of the right of proceeding at law in the collection of the obligation. Without such act, an extension of time or giving indulgence will not release or exonerate the surety. *Id.*
5. SURETY IS DISCHARGED WHERE CREDITOR MAKES AGREEMENT WHICH ESTOPS HIM from pursuing his remedy against the debtor. *Id.*
6. COVENANT NOT TO SUE UPON CLAIM CANNOT BE PLEADED TO, AND PRESENTS NO BAR TO, ACTION ON SUCH CLAIM. The only remedy of the covenantee in such a case is a suit for damages on the covenant or agreement. *Id.*
7. SURETY IS NOT DISCHARGED BY EXPRESS COVENANT NOT TO SUE PRINCIPAL DEBTOR FOR CERTAIN OR PRESCRIBED TIME, because, notwithstanding the agreement, suit may be commenced at any time. *Id.*
8. SURETY IS NOT DISCHARGED, where, for a valuable consideration, the holder of a note gives an extended time for payment to the principal debtor, but reserves to himself the right to sue whenever required by the surety. *Id.*
See GUARDIAN AND WARD; NEGOTIABLE INSTRUMENTS, 22, 24.

SURVEYS.

1. ALLOTMENT BY PLAN MAY INDICATE WITH CERTAINTY LOCATION OF EACH AND EVERY LOT, although no lot lines may in fact have been run out; if the lots can be made certain, that will be sufficient. *Wells v. Jackson Iron Mfg. Co.*, 575.
2. IN NEW HAMPSHIRE, COURSES IN DEED ARE PRESUMED TO HAVE BEEN RUN ACCORDING TO MAGNETIC MERIDIAN, unless there is something in the instrument to indicate a different method. And the word "due" prefixed to the courses will not justify the inference that a different method is intended. *Id.*

See BOUNDARIES; DEEDS, 5.

TAXATION.

1. WHERE ORIGINAL PAPERS TOUCHING SALE OF LANDS FOR TAXES FILED IN CLERK'S OFFICE ARE DESTROYED BY FIRE, their contents may be proved

by secondary evidence where the case does not disclose any better evidence. And it is not necessary in such a case that the record should be made up anew under the direction of the court. Such records are not proper records of the court itself, but are merely deposited in the office of the clerk. *Wells v. Jackson I. M. Co.*, 575.

2. WHERE SINGLE SUM IS ASSESSED UPON UNINCORPORATED PLACE, the treasurer's warrant is a list within the meaning of the statute, and the certificate of the deputy secretary upon the copy of it returned by the collector is competent evidence of the time of filing and return. *Id.*
3. CLERK AT AUCTION SALE FOR TAXES IS NOT OFFICER making or controlling the sale, and may become a purchaser thereat. *Id.*
4. IF PORTION OF TRACT KNOWN AS "SERGEANT'S PURCHASE" HAD BEEN ANNEXED by the legislature to the town of Jackson, what remained would constitute "Sergeant's Purchase," and be liable for the proportion of taxes assigned to that location. *Id.*
5. FACT THAT PARTY SETS UP CLAIM UNDER CONVEYANCE FROM CERTAIN PERSON does not prevent him from also setting up tax title, if he has acquired such, nor from relying upon mere possession. *Id.*
6. TRACT OF LAND, THOUGH UNINHABITED, MAY BE PROPERLY TAXED. *Id.*
7. ADVERTISEMENT OF SALE OF LAND FOR TAXES NEED NOT BE POSTED in unincorporated place which is not inhabited. *Id.*
8. SHARES OF STOCK IN FOREIGN MANUFACTURING CORPORATION ARE PERSONALTY, and if owned by citizens of Massachusetts are taxable there for their full value, without deducting the value of machinery and real estate belonging to the corporation, which is in the place of its corporate existence, and there taxed. *Dwight v. Mayor*, 149.

See DEEDS, 6; EMINENT DOMAIN.

TELEGRAPHS.

1. TELEGRAPH COMPANIES MAY SPECIALLY LIMIT THEIR LIABILITIES, but will not be protected from the consequences of gross negligence. *Wann v. Western Union Telegraph Co.*, 395.
2. IT IS NOT UNREASONABLE FOR TELEGRAPH COMPANIES TO REQUIRE REPE-
TITION of message, or otherwise the company will not be liable for any error in its transmission. *Id.*

TIME.

- QUESTION OF REASONABLE TIME IS ORDINARILY MIXED ONE OF FACT AND LAW. *Roth v. Buffalo & S. L. R. R. Co.*, 736.

TRESPASS.

1. WHERE GIST OF ACTION IS DISTURBANCE OF PLAINTIFF'S POSSESSION, what-
ever was done after the breaking and entry is but aggravation of dam-
ages. *Adams v. Blodgett*, 569.
2. PLAINTIFF IN TRESPASS MAY ELECT ANY DAY PRIOR TO DATE OF HIS
WRIT as the time when the defendant forcibly entered upon his land
and converted property thereon to his own use, and the defendant may
be compelled to pay the highest market value for the property taken at
the place of the conversion, with interest thereon from the time of the
taking to the day of the trial. *Id.*
3. JURY MAY DETERMINE DAMAGES IN TRESPASS BY MAKING FAIR AVERAGE
OF SALES of the same kind of property made near the time and place of
the conversion, and both before and after the taking. *Id.*

4. **JOINDER OF PARTIES.** — An individual may be joined as party defendant in an action against a corporation for trespass. *Brokaw v. New Jersey R. R. etc. Co.*, 659.

See CORPORATIONS, 9, 11.

TROVER.

See CO-TENANCY, 12; DAMAGES, 3; FIXTURES.

TRUSTS.

1. **TRUSTEE EX MALEFICIO OF LAND SOLD UNDER MORTGAGE FORECLOSURE.** — If one makes a parol agreement to buy at a foreclosure sale for the mortgagor, and prevents others from bidding by declaring such to be his purpose, and thus acquires the title at a price greatly below its value, and he afterwards attempts to claim the property for his own benefit after leaving the mortgagor in possession for several years, the law makes him a trustee *ex maleficio*, and equity, notwithstanding the statute of frauds, will treat him as a trustee for the owner, and on tender to him of the purchase-money and interest, he will be compelled to convey the property to the party equitably entitled to it. *Ryan v. Dax*, 696.
2. **PURCHASER BUYING FOR OWNER IS TRUSTEE.** If property is about to be sold under legal proceedings, and one agrees to purchase for the owner's benefit, and by artifice prevents others from bidding at the sale by declaring that he was to buy for the owner, whereby the property was sold at a great sacrifice, he will, if he afterwards endeavors to keep the property himself, be declared a trustee for the person defrauded. *Id.*
3. **TRUSTEE APPOINTED BY COURT OF EQUITY TO SELL REAL ESTATE CANNOT BUY AT SUCH SALE,** either on his own account or as the agent of a third person. *North Baltimore Building Association v. Caldwell*, 67.
4. **IF TRUSTS ARE ABSOLUTELY VOID UNDER RULE AGAINST PERPETUITIES,** legacies springing out of them must also be regarded as void. *Barnum v. Barnum*, 88.
5. **IF POWER TO LEASE INCLUDED IN TRUST IS VOID,** because of invalidity of the trust under the rule against perpetuities, the right to share in the distribution of the rents given by the instrument creating the trust will necessarily fail. *Id.*
6. **DEVISE IN TRUST IS VOID UNDER RULE AGAINST PERPETUITIES,** where the testator, after empowering and directing trustees named to lease his hotel property and apply the rents, provides that "the period during which my trustees, and their heirs and successors, shall have the power and are required to lease as aforesaid shall be so long as my said children, or any children or descendants of them, or any of them, left by them, or any of them, at the death of them, or any of them, shall live; it being understood that any lease made during the period aforesaid shall have full effect, and continue for its stipulated term, notwithstanding the cessation of all of said lives before the end of the term"; for under these provisions the period for continuing the trust or power to lease may extend so as to embrace persons and lives not *in esse* at the time of the testator's death. *Id.*
7. **WHERE TRUST IS VOID UNDER RULE AGAINST PERPETUITIES,** a power to lease which is not a mere power distinct from the trust, leaving the act to be done at the will of the party to whom it is given, but is mixed and

blended with the trust, and is as imperative in its execution as the trust itself, is also void. *Id.*

See DEEDS, 2-4; VENDOR AND VENDEE.

USAGE.

USAGE OF TRADE CANNOT BE ESTABLISHED which ingrafts on a contract of sale a stipulation or obligation different from or inconsistent with the rule of the common law on the subject; so a usage repugnant to the terms of a contract is inadmissible to control it. *Boardman v. Spooner*, 196.

VENDOR AND VENDEE.

1. **UNILATERAL OR OPTIONAL CONTRACT TO CONVEY LAND** or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy or consideration, will not be enforced in equity; but if made upon proper consideration, or if the consideration forms part of the contract or lease, it may be enforced. *Hawralty v. Warren*, 613.
2. **RIGHTS OF VENDEE UNDER CONTRACT FOR CONVEYANCE OF LAND** upon payment of purchase-money cannot be forfeited by the vendor, though default has been made in the payment of the price, while he has no title to convey, and is not in a position to perform his part of the contract. *Converse v. Blumrich*, 230.
3. **ONE WHO PURCHASES TITLE AND RIGHTS OF VENDOR AND VENDEE** with knowledge of the equities of a vendee of the latter becomes liable to the same extent and in the same manner as the persons from whom he bought. *Id.*
4. **FAIR SETTLEMENT OF CONFLICTING CLAIMS BETWEEN PARTIES IS BINDING UPON THEM**, though they may have yielded legal rights; and the law should favor and encourage such settlements. *Id.*
5. **VENDOR MAY ELECT TO TREAT EITHER AS TRESPASSER OR AS TENANT AT WILL** one who with his consent enters upon land under a contract of purchase, but fails to pay as he agreed; and he may maintain against him either trespass or *assumpsit* for use and occupation. *Woodbury v. Woodbury*, 555.
6. **LAPSE OF TIME ALONE CANNOT TERMINATE CONTRACTS FOR SALE OF LAND** conditioned to be void at the election of the vendor upon the failure of the vendee to fulfill the covenants, conditions, and agreements thereof; for time is not of the essence of the undertaking to pay money by such contracts, and default in payment must be followed by some act of the vendor indicating his election to consider the contract at an end. *Converse v. Blumrich*, 230.
7. **VENDOR OF LAND MAY RESERVE ASSIGNABLE RIGHT TO TAKE WATER** from a spring situated upon the land, through pipes of certain dimensions, with the right to enter upon the land to make repairs, upon payment of the damages caused thereby; and such right need not be limited as to the place or manner of its enjoyment, nor annexed to any particular estate. *Goodrich v. Burbank*, 161.
8. **VENDOR'S LIEN** does not exist in favor of an assignee of a note for purchase-money assigned after conveyance of the land to the wife of the vendee. *Massey v. Gorton*, 287.
9. **IN AGREEMENT TO CONVEY**, Words that party "shall have the privilege of purchasing" are sufficient in equity to entitle him to a conveyance of all the estate of the vendor at the time of the contract, although such words

are not so comprehensive as a positive agreement to convey, which means, when not qualified by words or circumstances, to convey the fee. *Hawthall v. Warren*, 613.

10. WHERE UNDER CONTRACT TO CONVEY the vendee requires a marketable title, and the wife of the vendor refuses to join in the conveyance, equity will not compel the vendor to procure a conveyance or release by his wife, or require him to furnish indemnity against her right of dower, unless in cases of clear fraud. *Id.*
11. TRUSTEE UNDER DEED GIVING HIM POWER TO SELL AND CONVEY CAN SELL AND CONVEY SUCH TITLE ONLY as is vested in him by his conveyance. Such an agent has no authority to bind his principal or grantor by a covenant in his name. *Barnard v. Duncan*, 416.
12. TRUSTEE'S CONVEYANCE UNDER POWER TO SELL AND CONVEY IS VALID WITHOUT WARRANTY OR PERSONAL COVENANTS. In fact, there can be no warranty of title on such sales, and all purchasers are bound to know it. *Id.*
13. AUTHORITY TO CONVEY MERELY GIVES NO IMPLIED POWER TO MAKE COVENANTS. *Id.*
14. TRUSTEE CANNOT BE REQUIRED TO ENTER INTO ANY PERSONAL COVENANTS FOR TITLE, or against encumbrances generally, where he has sold real estate under a deed of trust. He sells in his fiduciary capacity only, and acts as a mere agent to sell and convey, and as a trustee to execute the trust declared. *Id.*
15. USUAL TRUSTEE COVENANT AGAINST ACTS AND ENCUMBRANCES DONE OR SUFFERED BY HIMSELF is the only one which can be required of a trustee executing a mere naked power of sale under a deed of trust. *Id.*
16. PURCHASER MUST TAKE NOTICE OF TITLE AND ITS DEFECTS AS IT APPEARS OF RECORD, where he buys at a sale made by a mortgagee or trustee under a power to sell for the payment of debts. He cannot legally demand covenants for title contained in the conveyance to the trustee. *Id.*
17. VENDOR IS EXEMPTED FROM PERSONAL RESPONSIBILITY, WHEN. — Trustee having power under deed to sell and convey real estate, as well as executors, administrators, guardians, mortgagees, assignees for the benefit of creditors, and other like trustees, who have no other interest in the property than a legal title with power to sell and convey, are exempted from responsibility in making sales, except where fraud exists, or where they voluntarily enter into personal covenants of warranty. *Id.*
18. WAIVER OF DEMAND FOR TRUSTEE'S COVENANT, AND OF OBJECTIONS TO TRUSTEE'S DEED. — VENDEE MAY LAWFULLY DEMAND ORDINARY TRUSTEE COVENANT OF TRUSTEE who sells to him under power of sale, as the trustee cannot object to covenanting against acts or encumbrances done or suffered by himself; but if the vendee absolutely refuses to complete his purchase unless a deed with full general warranty of title is tendered, it amounts to a waiver of any demand for a covenant against the trustee's own acts merely, and of all objections to the deed that was tendered because of its not containing such a covenant. *Id.*
19. WHERE PURCHASER BUYS REAL ESTATE, AND TAKES DEED WITHOUT COVENANT OF WARRANTY, HE TAKES RISK OF TITLE ON HIMSELF. He must examine the records and title for himself, and so far the rule of *caveat emptor* may be said to apply to him. But misrepresentations or suppression of material facts are matters collateral to the written contract or deed, and may be inquired into on the ground of fraud. *Id.*

20. **VENDOR MUST DISCLOSE ALL MATERIAL FACTS OF WHICH HE KNOWS VENDOR TO BE IGNORANT.** *Id.*
21. **THERE MAY BE FRAUD IN SUPPRESSING AND CONCEALING MATERIAL FACTS,** as well as in direct misrepresentation, if the other party is knowingly suffered to deal under a delusion. *Id.*
22. **VENDOR MUST DISCLOSE DEFECTS, WHEN.** — **AT SALE BY TRUSTEE UNDER POWER,** where the facts or means of information concerning the condition and value of the thing sold are equally accessible to both parties, and nothing is said or done which tends to impose on the other, or to mislead him, there is no fraud of which the law can take notice; but where material facts are accessible to the vendor only, and he knows them not to be within the diligent attention, observation, and judgment of the other party, he is bound to disclose those facts, and make them known to the purchaser. *Id.*
23. **NEW NOTICE IS REQUIRED FOR NEW SALE.** Where the trustee in a deed of trust with a power of sale gives notice for a certain number of days, advertises the property, and puts it up for sale at public auction, and the property is struck off to a bidder, the trustee cannot upon the same day resell the property because the purchaser refuses to complete his contract; there must be a new publication of notice. *Id.*
24. **MEASURE OF DAMAGES WHERE PURCHASER AT TRUSTEE'S AUCTION SALE REFUSES TO PERFORM HIS CONTRACT,** and the property is resold on the same day within the hours mentioned in the advertisement, but at an enormous sacrifice, in consequence of most of the bidders having departed, is not the difference in price between the two sales, though it would be the proper criterion of damages actually sustained if the latter sale had been fairly made on proper notice; but even that would not be conclusive. The common-law rule is to give no more damages than the actual loss sustained; and where the property is shown to be still worth as much as was bid for it, the damages can be little more than nominal. *Id.*

See **BROKERS.**

WARRANTY.

See **SALES.**

WATERS.

SURFACE WATER. — Owner of land adjoining highway may erect upon his land a dam or obstruction to prevent water flowing through a culvert which the public had built for the purpose of draining off the surface water upon the road. Provided he does not exceed the limits of his own land, he may do anything to prevent the surface water upon the highway from being drained upon his premises. *Franklin v. Fisk*, 194.

See **RIPARIAN RIGHTS.**

WILLS.

1. **LAST WILL AND TESTAMENT IS INOPERATIVE AND VOID** where its existence is made to depend upon a contingent event, which comes to pass. *Mages v. McNiel*, 354.
2. **DECLARATIONS OF TESTATOR ARE INCOMPETENT AS EVIDENCE** to add to, explain, or in any manner control the construction of a will. *Id.*
3. **EVIDENCE AS TO CONDITION OF MIND OF TESTATOR AFTER MAKING HIS WILL,** which depends for its existence and operation on the non-happen-

ing of an event which comes to pass, is irrelevant, and should be excluded. *Id.*

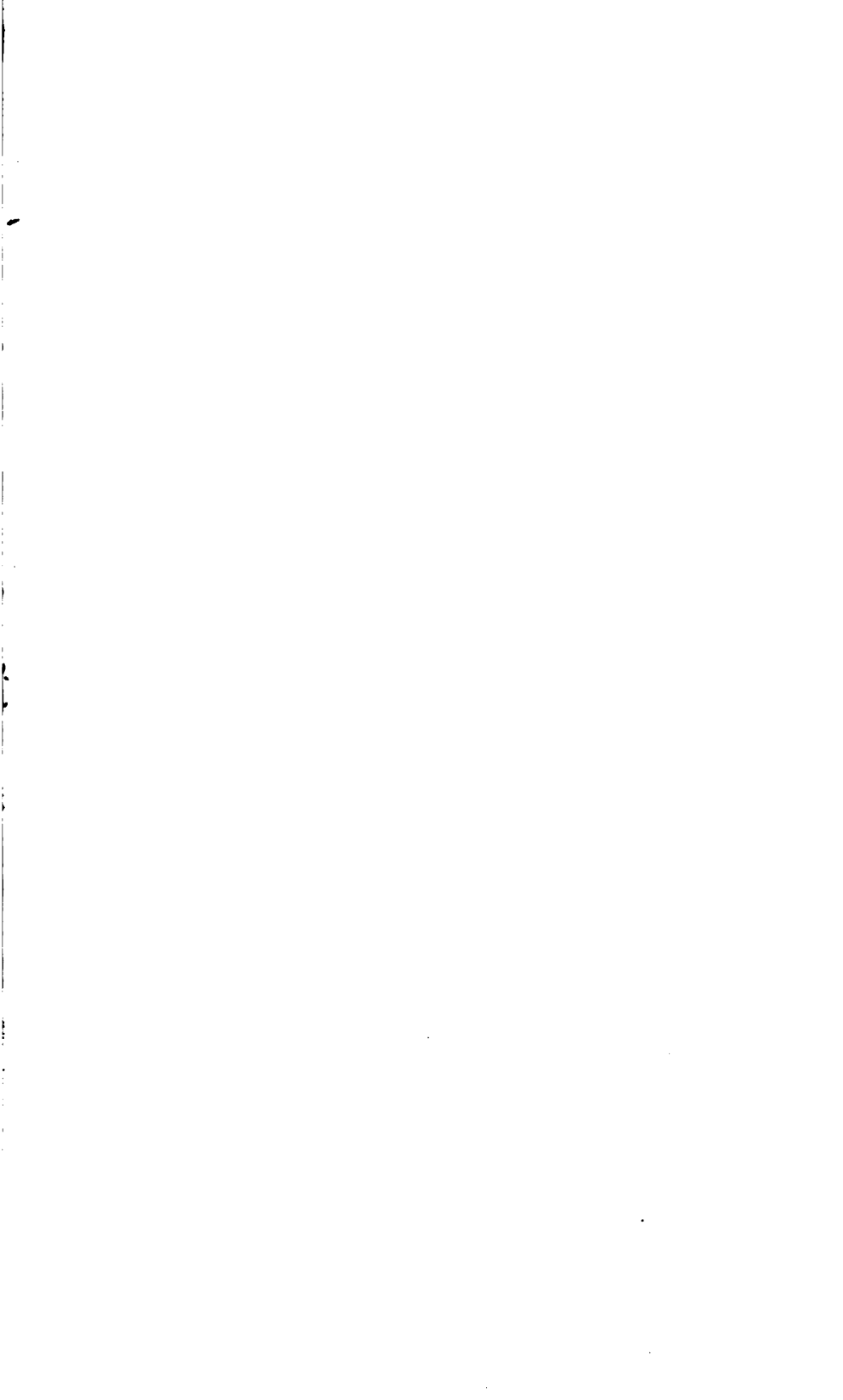
4. CONSTRUCTION AND EFFECT OF WILL ARE QUESTIONS OF LAW FOR COURT, and not matters of fact for the determination of the jury. Whether a paper offered in evidence is testamentary in its character, or whether it is to take effect absolutely, or only on condition, is to be determined by proper instructions of the court to the jury. *Id.*
5. WHERE TESTATOR, AFTER HAVING DEVISED IN TRUST, PROVIDES as follows: "Should my views in the above first article of this will be disappointed, so that judicially or otherwise a sale should take place of said City Hotel buildings and grounds during the life of my children, it is my will and I direct that my trustees, or any court of equity, shall cause the proceeds of sale to be invested in mortgage or ground-rents, or in debt of the United States or of the city of Baltimore; and that subject to the payment of one third of the income of the investment to my wife during her life, the said investment shall be for the benefit of my children during their lives, and after their deaths shall be the property, for the shares of the decedents, of their respective children or descendants, *per stirpes*; the children or descendants of such of my children as shall have died before the investment, taking as their absolute property, and *per stirpes*, the shares to which, if they had lived, the deceased would have been entitled," — *held*, that as equity treats as done that which ought to be done, if upon the failure of the first article, parties became entitled to the proceeds of sale when effected, they would have a right to resort to a court of equity for a sale which would produce those proceeds; and that in substance the will is the same as if it directed a sale to take place in case the views in the first article could not be carried out. *Barnes v. Barnes*, 88.
6. PROBATE COURTS MAY ADMIT TO PROBATE CODICIL OF WILL which it has already admitted to probate, though the codicil is written upon the back of the same leaf upon which the will is written, and even after the time for appealing from the decree has passed, if such codicil escaped attention, and was not passed on at the time of the probate of the original will. *Waters v. Stickney*, 122.
7. PROBATE OF WILL, WHEN OBJECTIONS ARE FILED as soon as the paper is propounded, should not be taken until after the objections are disposed of. *Jones v. Moseley*, 327.
8. IMPLIED REVOCATION OF WILL cannot be shown by the declarations of the testator, unless a material change appears in his condition, creating new moral duties and obligations. The change must be in material relations, and not in mere sentiment or feeling. *Id.*
9. EVIDENCE OF RECONCILIATION TO CHILD INTENTIONALLY OMITTED FROM WILL, and of the dying declaration of the testator that he wanted his children all to be equal, is not admissible to show an implied revocation of the will. *Id.*
10. INCOMPETENT WITNESS AS TO SOUNDNESS OR UNSOUNDNESS OF TESTATOR'S MIND. — The opinion of a witness who did not attest the execution of a will, and who is not specially qualified by scientific knowledge to judge of the soundness or unsoundness of the testator's mind, is not competent evidence as to that fact. In testifying as to matters within his own observation, bearing upon the competency of the testator, he may characterize as rational or irrational the acts and declarations to which he

testifies; but his examination must be limited to his own conclusions from the specific facts he discloses. *Clapp v. Fullerton*, 680.

11. SAME. — EXCEPTION TO THIS RULE IS ADMITTED IN CASE OF ATTESTING OR SUBSCRIBING WITNESSES TO WILL, whose opinions are always competent, and are admitted *ex necessitate* as throwing light upon the *res gestæ*. They may state their own convictions as to the testator's capacity, for they were immediate actors, and may well retain a recollection of the general result of their observation after the particular circumstances have been effaced by lapse of time. *Id.*
12. JUDGMENT AT LAW WILL BE REVERSED WHERE IMPROPER EVIDENCE WAS ADMITTED; as where a witness who did not attest the execution of a will, and was not qualified to speak as an expert, was permitted to testify generally that in his opinion the testator was of sound mind; but this rule has its limitations in equity. *Id.*
13. ON APPEAL FROM DECREE OF SURROGATE, REVIEW IS IN NATURE OF RE-HEARING IN EQUITY; and the admission of improper evidence on the original hearing before the surrogate, as where a non-expert or non-professional witness was permitted to testify as to his opinion of the testamentary capacity of the testator, furnishes no ground for reversing the decision in the supreme court, if the facts established by legal and competent testimony are plainly sufficient to uphold it. *Id.*
14. PROBATE OF WILL SHOULD NOT BE REJECTED SIMPLY BECAUSE TESTATOR, IN OTHER RESPECTS COMPETENT, entertained the mistaken idea that his eldest daughter was illegitimate, if such idea was not the effect of an insane delusion, but of slight and inadequate evidence acting upon a suspicious, jealous, weakened, and failing mind. *Id.*

WITNESSES.

1. WOMAN IS INCOMPETENT AS WITNESS AGAINST MAN TO WHOM SHE WAS MARRIED four years after separation from her first husband, from whom she had heard nothing for sixteen years since the second marriage. The presumption of the wife's innocence in marrying again will overcome any presumption that a man not heard from for four years before her second marriage and sixteen years afterwards was alive and her lawful husband when she married the second time. *Kelly v. Drew*, 138.
 2. HUSBAND IS INCOMPETENT WITNESS FOR WIFE in a civil suit in which she is a party. *Cramer v. Reford*, 594.
 3. COURT IS BOUND TO INTERFERE AND PROTECT WITNESS when the interrogatories put to him upon cross-examination tend to impute crime, or to disgrace him. And an accomplice offered as a witness for the state is entitled to this protection. *State v. Staples*, 565.
 4. QUESTION WHETHER WITNESS COULD FORM OPINION FROM APPEARANCE as to the capacity of an engine to draw a train is properly overruled where the witness is not claimed or shown to be an expert. *Sisson v. Cleveland etc. R. R. Co.*, 252.
 5. QUESTIONS ASKING WITNESS WHETHER OR NOT HE IS ACQUAINTED WITH SIGNATURES to certain deeds, and whether or not they are genuine, are not leading. *Wells v. Jackson Iron Mfg. Co.*, 575.
 6. QUESTION ASKING WITNESS TO STATE WHAT HE KNOWS IN REFERENCE TO EXECUTION OF ENCLOSED PAPER is not leading. *Id.*
- See AGENCY, 9; ATTACHMENT, 5; ATTORNEY AND CLIENT; COMMON CARRIERS, 20; DEPOSITIONS; EVIDENCE, 5-7; JURY AND JURORS, 1; NUISANCE; WILLS.



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